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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NUECES COUNTY NAVIGATION DISTRICT NO. 1
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

NUECES COUNTY NAVIGATION DISTRICT NO. 1, et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

PRODUCERS GRAIN CORPORATION, et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

NUECES COUNTY NAVIGATION DISTRICT NO. 1, et al, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

PRODUCERS GRAIN CORPORATION, et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

Nos. 78-1348, 79-1816, 80-1842 and 80-1843.

United States Court of Appeals, Fifth Circuit.

May 6, 1982.

TATE, Circuit Judge:

The petitioners, who represent port and shipper interests in Corpus Christi, Texas, seek review of an adjudication of the Interstate Commerce Commission that a rail rate of a carrier was not discriminatory to Corpus Christi, and of an order of the Interstate Commerce Commission that, *inter alia,* adopted a new standard of "common control" to be used in carrier rate discrimination cases under 49 U.S.C. § 10741(b), and that reopened and vacated two earlier Commission decisions. We affirm the Commission's rule-making and vacation orders, but we find that review of the Commission's discriminatory-rate adjudication is now moot.

The underlying central issue concerns the substantive and procedural propriety of the Commission's actions in adopting a new standard or rule of a narrow nature. The narrow area of the rule focuses on the determination of whether a common carrier has under 49 U.S.C. § 10741(b) subjected a port to rates that are unreasonably discriminatory with regard to those to other ports, in instances where that carrier does not itself provide direct service but must do so by joint rates issued in conjunction with a connecting carrier. The new standard requires a finding that the originating carrier has *actually* contributed to or controlled the rate insofar as it is discriminatory. Under the prior or replaced standard, the originating and connecting carriers were conclusively presumed to have "common control" of the joint rates — that, acting in conjunction as a network, they directly and effectively controlled the rates between the preferred port and the prejudiced port. For reasons to be stated, we find the Commission's adoption of a new rule of decision to be non-arbitrary and within its administrative discretion and the statutory limits for that discretion set by Congress.

We should further note that the Staggers Rail Act of 1980, Pub.L.No. 96-448, 94 Stat. 1895 (1980), was not signed by the President into law until October 14, 1980. Without intimating that our rationale would necessarily be affected otherwise, we note that the Act does not apply to our review of the present decisions of the Commission, which were docketed (and decided) prior to the effective date of the Act. *Id.* § 706.

Introductory Summary

In the attached appendix, we have set forth the full citation and nomenclature of the proceedings and parties to whom we will refer herein. As shown by these proceedings, the context in which the present issues arise is as follows:

In 1977, Frisco (a rail carrier) published reduced carload rates on wheat from origins in Oklahoma and Kansas to various Texas ports (Houston, Galveston, etc. – "other Texas ports"), but not to Corpus Christi. Prior to this publication, the rates had been equal to all Texas ports; the reduced rates for the other Texas ports were about 3 1/2 cents per hundred pounds less than those for Corpus Christi. Various Corpus Christi port and shipping interests protested, including Nueces County (a Texas port district), Producers (a regional grain marketing cooperative with a large-volume grain elevator at Corpus Christi), and Dreyfus (a large-scale shipper of grain that used the Producers elevator at Corpus Christi). The basis of their protest was that the rates were unduly preferential of the other Texas ports, and prejudicial to the Corpus Christi port, in violation of former Section 3(1) of the Interstate Commerce Act, now (in the 1978 recodification) 49 U.S.C. § 10741(b).

Frisco had lowered the rates to the other Texas ports to meet rail and truck rate competition. The reason it had not done so for Corpus Christi was that Frisco had no direct line into that port, and the other connecting rail carriers to that port (MoPac and Southern Pacific) had refused to concur in a lowered joint rate equivalent to that published for the other ports.

In its 1977 decision in *Wheat I* (see appendix for this and other citations herein) rejecting these protests, the Commission held that Frisco was not in control of and did not participate in the disparate rates for Corpus Christi, because Frisco had made a good faith offer of division of the joint rates (to divide the lower rates fairly between the connecting carriers and itself), but these carriers had rejected this offer. Due *inter alia* to the protestant's contention that Frisco's reduced rates to other Texas ports violated outstanding Commission orders in 1954 and 1961 decisions in *Corpus Christi I*, the Commission reopened *Wheat I*. In *Wheat II* (1979), it then reinstated its holding that the Frisco rates to Corpus Christi were not unreasonably discriminatory (for the same reason of Frisco's lack of control thereof), but it also ordered the *Corpus Christi I* cases to be reopened to determine whether those decisions were consistent with *Wheat II*.

In *Corpus Christi I* (1954 and 1961), the Commission had concluded that the joint rates of various carriers transporting grain from the Midwest were unduly prejudicial to Corpus Christi and unduly preferential of the other ports. In so finding, the Commission relied upon a presumed network "common control" of joint rates, so that – if the joint rate was discriminatory – each of the carriers joining in it was held to participate in the discriminatory rate. Accordingly, the Commission entered "alternative orders," which were still in effect at the time

of *Wheat I* (1977) and *Wheat II* (1979). (By an alternative order issued to correct discriminatory rates, the offending carrier(s) are ordered to abate the discrimination by raising one rate, lowering the other, or altering both. *See, e.g., Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 650, 53 S.Ct. 768, 776, 77 L.Ed. 1410 (1933).)

Pursuant to *Wheat II,* after service, notice was published in the Federal Register reopening the *Corpus Christi I* cases (1954 and 1961). *Wheat II,* then before this court on petition for review, was on motion remanded to the Commission for its further consideration. In the resulting *Corpus Christi II,* decided in 1980, the Commission expressly abandoned its former presumed "common control" of joint rates and held that, in the determination of discriminatory rate issues under § 10741(b), it would in the future utilize an analysis of actual control by the originating carrier (applying the good faith order of divisions test enunciated in the *Wheat* cases).[1] It therefore

[1]In *Wheat II,* the Commission discussed in detail how the actual common control-good faith offer of divisions test operates.

According to the Commission, "the protestant has the initial burden of proving that the originating carrier could serve both the preferred and prejudiced parts either by itself or by means of connecting carriers, acting as a network or otherwise." 359 I.C.C. at 603. In *Wheat II,* the Commission noted that Frisco serves the preferred ports directly and can serve Corpus Christi indirectly by means of Southern Pacific or MoPac. *Id.*

Once the protestant has satisfied its burden of showing that the origin carrier could serve both points, the burden shifts to the origin carrier (or to the connecting carriers if they too, have actual control, *see* 364 I.C.C. at 275) to rebut the protestant's evidence of common control by showing that the respondent has made a good faith offer of division of revenues to the connecting carriers, but was unsuccessful in obtaining a concurrence. If the respondent can show that it did make this good faith offer, the Commission contends, "it demonstrates that [the origin carrier] has no actual control of the rates to the ports which it does not serve directly." 359 I.C.C. at 603.

vacated the decisions in *Corpus Christi I* and reaffirmed its holdings in *Wheat I* and *Wheat II*.[2]

Wheat *Adjudications Moot*

Before discussing the viable issues under review, we note of our own motion that the *Wheat* adjudications (that Frisco's grain rates to Corpus Christi are not shown to be unreasonably discriminatory under § 10741(b) are moot.

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[2]In the *Wheat* adjudications, the Commission likewise rejected the protestant's alternative request that, even if common control be found absent, the Commission could prescribe non-discriminatory rates to Corpus Christi pursuant to 49 U.S.C. § 10704(a)(1), former Section 15(1) of the Interstate Commerce Act. This provision authorizes the Commission, *inter alia*, to prescribe a rate (including a maximum or minimum rate) if, after hearing, it decides that a carrier's rate violates the Interstate Commerce Act as recodified, Subtitle IV, 49 U.S.C. §§ 10101 et seq. The Commission found that, absent Frisco's control of the disparate rates to Corpus Christi, no discriminatory-rate violation of the statute was proved.

Prescription of a rate under section 10704 differs from the issuance of an alternative order under section 10741(b) in that, as the Commission interprets section 10704, the latter is a remedial section that requires violation of some substantive section of the Act as a predicate for rate prescription. (Of course, if the Commission *had* found unreasonable discrimination under § 10741(b), a substantive violation, that would have justified issuance of a rate-prescription; but it did not.) On the other hand, issuance of an alternative order is a specific response to a violation of section 10741(b), prohibiting unreasonable rate discrimination.

No claim was made in the present proceedings that Frisco's rates were "unreasonable" or violated the statute other than being unreasonably discriminatory to Corpus Christi, a contention rejected by the Commission. The Commission expressly noted that its present decision(s) did not preclude the Corpus Christi interests from further proceedings under § 10704 that raised such issue.

In view of our determination that the petitions to review the *Wheat* holdings are moot, we do not reach this issue. *See also* note 6, *infra*.

Following *Wheat I*, MoPac concurred in a reduced joint rate to Corpus Christi equivalent to the reduction published for the other Texas ports. As a result, it is not contested that Corpus Christi is no longer prejudiced by the Frisco rates initially complained of. Accordingly, the three petitions for review that raise issues directed solely to the invalidity of the *Wheat* determinations[3] are dismissed[4] as moot.

No suggestion of mootness is made with regard to the *Corpus Christi II* issues presented by the remaining petition for review. *See* note 3. That decision's vacation of the continuing rate-equalization orders in *Corpus Christi I* deprived Corpus Christi interests of a former remedy by which to attack rail rate disparities; and its adoption by way of rule-making of a new rule (actual control, rather than the formerly presumed common control of joint rates) has obvious continuing effects.

The Issues

The remaining issues presented to us for review may be summarized as follows:

[3]These petitions are our docket nos. 78-1348, 79-1816, and 80-1842. The remaining petition, our docket no. 80-1843, raises still viable issues. See appendix to this opinion.

[4]Before the Commission, where petitioners conceded that *Wheat I* and *Wheat II* were moot for the reason noted, they also contended that the proper remedy was to vacate these decisions rather than to dismiss them, as was suggested also in oral argument before us. Whatever merit this procedural approach to mootness has where issues of res judicata are implicated, see *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950), the policies there involved do not apply here; for, among other reasons, the non-moot *Corpus Christi II, see infra,* itself vacated the *Corpus Christi I* decisions and itself established the new precedential rule concerning "common control" (the harms sought to be avoided by petitioners in having *Wheat I* vacated instead of dismissed).

I. A substantive attack upon the Commission's replacement of the former presumed "common control" rule by the new "actual control" test as an unjustified abrogation by the Commission of its previously settled interpretation designed to advance the anti-discriminatory purposes of the Interstate Commerce Act.

II. A primarily procedural attack upon the Commission's vacation by *Corpus Christi II* in 1980 of its 1954 and 1961 *Corpus Christi I* decisions.

I. *The Commission's Replacement of the Presumed "Common Control" Rule by an "Actual Control" Test*

In the context of the scheme of the Interstate Commerce Act ("the Act"), where carriers are permitted to establish rates for their services, the Act provides that no common carrier may "subject a person, place, port, or type of traffic to *unreasonable discrimination.*" 49 U.S.C. § 10741(b).[5] It is to be noted that this provision includes

[5]Section 10741(b) provides in full:

> A common carrier providing transportation or service subject to the jurisdiction of the Commission under Chapter 105 of this title [49 U.S.C. §§ 10501 et seq., the 1978 recodification of the Act] may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (C) of this section, this subsection does apply to discrimination against the traffic of another carrier providing transportation by any mode.

In an Act of October 17, 1978, 92 Stat. 1337, Congress recodified and simplified the language of the Interstate Commerce Act. Section 10741(b) replaces the former section 3(1) of the Act. Section 3(1) forbade "undue or unreasonable preference or advantage," while 10741(b) forbids "unreasonable discrimination." The recodification was expressly intended to effect no substantive change in the Interstate

within its scope only whether a given carrier provides discriminatory rates to a preferred and to a prejudiced point; it has no application where the rates of a given carrier to one point are disparate with those of another carrier to an equivalent point. *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 649-50, 53 S.Ct. 768, 776, 77 L.Ed. 1410 (1933).

With regard to joint rates to a point – those combined charges for the services of both the originating and the connecting carriers (with division thereof decided between the joining carriers) –, the Supreme Court early stated that

> participation in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination . . . . If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of connecting carriers.

Central Railroad Company of New Jersey v. United States, 257 U.S. 247, 259, 42 S.Ct. 80, 83, 66 L.Ed. 217 (1921). As the Court later stated, reiterating the point: "A carrier or a group of carriers must be the common source

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Commerce Act. The Commission has stated in one of the decisions in the present appeal that "[b]ecause there is no substantive change in the law under the recodified statute and because many of the court and Commission decision (sic) arose under the former act, we shall use interchangeably sections 3(1) and 10741 and the terms "unreasonable discrimination" and "undue preference and prejudice." *Nueces County Navigation District No. 1 v. Abilene & Southern Railway Company,* 364 I.C.C. 269, 270 n. 3 (1980) (*Corpus Christi II*). The petitioners concede that the revision made no substantive change in the Act.

of the discrimination – must *effectively* participate in both rates, if an order for correction of the disparity is to run against it or them." *Texas & Pacific Ry. Co., supra,* 289 U.S. at 650, 53 S.Ct. at 776. (Emphasis supplied.)[6]

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[6]The petitioners argue that the later decisions of *Ayrshire Collieries Corporation v. United States,* 335 U.S. 573, 69 S.Ct. 278, 93 L.Ed. 243 (1949) and *New York v. United States,* 331 U.S. 284, 67 S.Ct. 1207, 91 L.Ed. 1492 (1947) somehow modified the holdings in *Central Railroad* and *Texas & Pacific Ry. Co., supra,* that an *alternative order* to end rate-discrimination may not be issued unless the carrier(s) effectively participated in the discriminatory joint rate. We reject this contention. As the Commission noted, *Wheat II,* 359 I.C.C. at 597-98, these decisions explicitly did not refer to a situation where an alternative order is the appropriate relief. *See, e.g., Ayrshire, supra,* 335 U.S. at 593-94, 69 S.Ct. at 289.

A stronger argument is made by the petitioners, however, that these decisions indicate that, even if an alternative order is not appropriate, the Commission is entitled to *prescribe* rates if the joint rates are unreasonably discriminatory (*i.e.,* even in the absence of joint control). We have previously noted that the mootness of the *Wheat* adjudications precludes our reaching the specific demand for prescribed rates in those cases. See note 2.

Nevertheless, we recognize that a strong argument could be made that the Commission's view as to when rate-prescription is appropriate (rather than an alternative order) in discriminatory rate cases, as enunciated in *Wheat I* and *Wheat II,* could be regarded as non-moot rule-making in *Corpus Christi II;* there, in reaffirming the *Wheat* cases, the Commission specifically modified its *Wheat* "discussion of rate prescriptions in the absence of common control." 364 I.C.C. at 279. We decline to so characterize the *Wheat* rate-prescription "discussion" and its modification in *Corpus Christi II.* While it is difficult to disagree in the abstract with the Commission's view that under present circumstances *Ayrshire* and *New York* do not permit rate prescription unless a rate is *both* unreasonable and discriminatory – and that a rate cannot be discriminatory under the statute unless the carrier effectively participates in it – we do not feel it appropriate to rule upon the propriety of the Commission's views on the matter upon a record devoid of factual data suggesting how the rates at issue could be *unreasonably* discriminatory in violation of section 10741(b), even though no individual rate at issue is either unreasonable or a violation of section 10741(b).

By way of further background, a rate-discrimination case, § 10741(b) is established by showing (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. The complaining party has the burden of proving the presence of the first three factors, and the carriers have the burden of justifying the disparity, if possible, in connection with the fourth factor. *See, e.g., Chicago & Eastern Illinois Railroad Company v. United States,* 384 F.Supp. 298 (N.D.Ill. 1974), *aff'd. mem.* 421 U.S. 956, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975).

The issue before us involves solely the third element needed to establish a claim of discriminatory rate – that the carrier be the "common source" of both prejudicial and preferential rates. The order issued in *Corpus Christi II* – establishing an "actual control" test rather than a presumed "common control" of joint rates – resulted from notice served and published in the Federal Register to the effect that the Commission was "considering moving from a conclusive presumption of common control to an analysis of actual control over the joint rates."[7] The

[7]The notice published at 44 Federal Register 67558-559 (No. 228, November 26, 1979), stated that the Commission was reopening the *Corpus Christi I* decisions and invited briefs and comments. The notice provided:

> *Summary:* The above-captioned cases [the Corpus Christi cases] are being reopened to determine if the port equalization orders entered in these proceedings should be modified. As the orders presently exist, the carriers are required to maintain equivalent rates to both the Houston area ports and Corpus Christi. The orders were entered partly on the basis of the railroads' ability to control the rates to the Gulf ports. Our reexamination of these cases

decision of the Commission in *Corpus Christi II* limited its consideration to this criteria,[8] and its modification of its

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will be limited to the issue of actual control of rates to the Gulf ports and how control of these rates influences the Commission's authority to order relief in cases arising under 49 U.S.C. 10741. We will focus on situations where carriers cannot agree on rate policies and, as a result, concurrences to joint rate changes cannot be secured. We will also explore the circumstances, if any, in which a violation of 49 U.S.C. 10741 might exist if common control of rates is not found when unequal rates are proposed to the Gulf ports. We believe this action is necessary to appropriate regulation in this area.

Supplemental Information: Our purpose in reopening the Corpus Christi cases is to determine whether these outstanding port equalization orders require modification to recognize current rate-making situations not contemplated when the outstanding orders were issued . . . .

* * * * * *

We are considering moving from a conclusive presumption of network common control to an analysis of actual control over the joint rates. The principal test of actual control which we are considering is discussed in *Wheat, Oklahoma and Kansas to Texas Gulf Ports,* 357 ICC 382 (1977), 359 ICC 592 (1979) [*Wheat II*], which is presently pending on court appeal.

An extended analysis of actual common control is a departure from past Commission decisions and directly affects the operation of the Corpus Christi orders. Accordingly, it is necessary to reopen these proceedings and receive comments. Participants should comment on the appropriate legal analysis of the issue of rate control in cases arising under 49 U.S.C. § 10741. Commentors should also address the question of, under what circumstances, if any, unequalized rate proposals should be found to violate § 10741 when there is no common control.

[8]The Commission noted, however, *Corpus Christi II,* 364 I.C.C. at 270:

This limiting of the issues to only one of the criteria

former test to determine whether a carrier is the "common source" of the discriminatory rates is the only substantive issued posed for us by this petition for review.

A. "Presumed Common Control" and "Actual Control" Tests

In *Texas & Pacific Ry. Co., supra,* as previously noted, the Supreme Court had indicated that, for a carrier participating in allegedly discriminatory joint rates to meet the "common source" requirement (*i.e.,* that the carrier be the source of both the prejudicial and the preferential rate), the carrier "must *effectively* participate in both rates." 289 U.S. at 650, 53 S.Ct. at 776 (emphasis supplied).

At the times that the *Corpus Christi I* cases were decided in 1954 and 1961, the Commission used a "network common control" theory to determine whether carriers effectively participated in a discriminatory joint rate. By this test, the Commission, in effect, conclusively presumed common control because the carriers involved acted as a network, so that each was responsible for the joint rate. In the 1954 *Corpus Christi* case, the carriers were found to have effective common control of the rates simply by vir-

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under section 10741(b) was not and is not intended to detract from the importance the Commission places on the other three criteria. The fourth factor, similarity or disparity in transportation conditions, continues to be our primary consideration. It is axiomatic that there can be no discrimination if economic and operational analysis proves that different rates are appropriate. This analysis includes review of matters such as the different distances involved, alternative routings available, differences in the cost of service, and, especially, any differences in competitive conditions.

tue of carrier participation in joint rates. *See* 291 I.C.C. at 469-470. In the 1961 *Corpus Christi* case, the carriers attempted to argue that "no one carrier effectively controls the rates to Corpus Christi and the other allegedly preferred ports." 315 I.C.C. at 162. Without any discussion of the matter, but citing *Texas Pacific Ry., supra,* the Commission asserted that the carriers "acting in conjunction with the originating lines, directly and effectively control the rates." *Id.*

During the 1970's the Commission began to modify its approach to this analysis of common control. For example, in *Soybeans, Midwest to Chicago and Gulf Ports, Export,* 335 I.C.C. 883, 890 (1970), *vacated as moot,* 416 U.S. 953, 94 S.Ct. 1964, 40 L.Ed.2d 303 (1974), the Commission refused to find common control by an origin carrier where connecting carriers refused to concur in rate changes, and where there was no showing of mutual and joint participation in the action alleged to be discriminatory. In *Corn and Soybeans Midwest to Gulf Ports, For Export,* 349 I.C.C. 1, 4 (1974), the Commission held that where a carrier served one port directly and one by means of a joint service with a second railroad, section 10741(b) "does not give this Commission the power to require equalized rates in the event that the second railroad refuses to participate in an equalized joint rates."

The Commission's movement away from applying a conclusive presumption of common control of joint rates culminated in *Wheat I* and, particularly, in *Wheat II.* In the latter decision the Commission explicitly adopted an "actual control" test, see note 1, and explicitly rejected the common-control presumption: "To summarize, because of the need to assure rate flexibility, we have required proof that the railroads actually control the rates to the preferred and prejudiced ports. In this regard, we believe

that the presumption of control extending from the existence of a network such as was found to exist in the Corpus Christi cases is insufficient to assure that actual control exists. While seeking proof of actual control, we have allowed the railroad to show that it does not have such control because it could not, after acting in good faith, arrive at divisions agreements." *Wheat II,* 359 I.C.C. at 604. As a consequence, after service and publication of notice, reopening *Corpus Christi I* to consider a substitution of an actual control test for the former presumption of network control, see note 7, the Commission by way of a rulemaking procedure adopted in *Corpus Christi II* the order presently under review: "The actual control standard shall be used to determine the common source of unreasonable discrimination under 49 U.S.C. 10741(b) in future challenges to carrier rate adjustments to the ports in these proceedings." 364 I.C.C. at 279.

B. The Scope of Our Review

The scope of our review of Interstate Commerce Commission action is reiterated in *Missouri-Kansas-Texas Railroad Company v. United States,* 632 F.2d 392 (5th Cir. 1980), *cert. denied,* 451 U.S. 1017, 101 S.Ct. 3004, 69 L.Ed.2d 388 (1981), which involved, in part, the Commission's adoption of a different standard for determining whether a railway merger is "consistent with public interest." We stated: "We can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record as a whole." *Id.* at 400.

The "arbitrary and capricious" standard is narrow and

permits a reviewing court merely to consider whether the agency decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971). The "substantial evidence" standard requires a determination that agency findings are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. N. L. R. B.*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938). If the evidence of record is such that it supports inconsistent inferences and conclusions, the courts must defer to administrative choice. *Illinois Central Railroad Co. v. Norfolk & Western Railway Co.*, 385 U.S. 57, 69, 87 S.Ct. 255, 262, 17 L.Ed.2d 162 (1966). This same standard of review is used in our review of a Commission rate determination. *See Systems-Fuels, Inc. v. United States*, 642 F.2d 112 (5th Cir. 1981).

The judicial deference that is accorded to a Commission action of the present nature is attributable to the fact that "the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination." *United States v. Chicago Heights Trucking Co.*, 310 U.S. 344, 352-53, 60 S.Ct. 931, 936, 84 L.Ed. 1243 (1940). The broad discretion thus accorded to the I.C.C. in these cases has long been recognized as necessary to the types of value judgments therein involved:

> Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and

> discretion of the Commission . . . and upon which its decisions, made the basis of administrative orders operating in future, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits or for some other reason amount to an abuse of power.

Manufacturers' Ry. Co. v. United States, 246 U.S. 457, 481, 38 S.Ct. 383, 389, 62 L.Ed. 831 (1918).

The "narrow scope within which Congress has confined judicial participation" in the Commission's rate determinations is attributable to the fact that "[t]he process of rate making is essentially empiric . . . fluid and changing . . . [involving] factors that must be valued as well as weighed." Congress has, therefore, given the Commission "the duty of being responsive to the dynamic character of transportation problems." *Board of Trade of Kansas City v. United States,* 314 U.S. 534, 546, 62 S.Ct. 366, 372, 86 L.Ed. 432 (1942).

C. The Actual Common Control Standard

In adopting the actual common control standard, the Commission swept away a presumption of network common control that it used for many years to impose strict liability on carriers based on their participation in joint rates and the presence of interconnecting rail lines. We must now determine, within the narrow scope of review that we have, whether the Commission acted properly in abolishing this former presumption and in adopting, instead, a test that centers on factual issues that determine whether the carrier participated in the *actual* control of the disparate joint rate claimed to be discriminatory.

When we considered a Commission change in policy in the context of railroad mergers, we stated that "it is established beyond argument that an agency may change its policies so long as it identifies and articulates its reasons for doing so." *Missouri-Kansas-Texas Railroad Company v. United States*, 632 F.2d 392, 403 (1980), *cert. denied*, 451 U.S. 1017, 101 S.Ct. 3004, 69 L.Ed.2d 388 (1981). Our opinion in *Missouri-Kansas-Texas* echoed that of the Supreme Court in *American Trucking Associations, Inc. v. Atchison, Topeka, and Santa Fe Railway Company*, 387 U.S. 397, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967), in which the Commission had changed its former interpretations and then argued, much as the Commission does in the present case, that its past interpretation was based on an erroneous interpretation of principles enunciated by various judicial decisions. The Supreme Court did not, however, rest its analysis of the propriety of the Commission change in interpretation on the Commission's argument that its own prior decisions in a course of twenty-five years were *erroneous*. Rather, instead it specifically recognized the ability of the Commission to change its mind and to change its prior interpretations:

> [T]he Commission, faced with new developments or in light of consideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice . . . . Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adopt their rules and practices to the Nation's needs in a volatile, changing economy.

387 U.S. at 416, 87 S.Ct. at 1618.

Our principal concern, then, is to determine whether

the Commission has observed the statutory limits that Congress has set for its discretion, and that the Commission has exercised such discretion and has explained its departure from previous policy so that a reviewing court may determine that the decision is reasoned and not arbitrary. *Burlington Truck Lines v. United States,* 371 U.S. 156, 167-68, 83 S.Ct. 239, 245, 9 L.Ed.2d 207 (1962); *Missouri-Kansas-Texas Railway Company v. United States,* 632 F.2d 392, 403 (1980), *cert. denied,* 451 U.S. 1017, 101 S.Ct. 3004, 69 L.Ed.2d 388 (1981).

Applying the criteria set forth above, we first note that, under section 10741(b) of the Act, Congress gave the Commission a mandate "to protect persons, places, ports, or traffic types from unreasonable discrimination. This duty was reiterated in transportation policy sections of the revised Interstate Commerce Act 49 U.S.C. 10101." *Corpus Christi II,* 364 I.C.C. at 276. "Whether a discrimination in rules or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic." *New York v. United States,* 331 U.S. 284, 347, 67 S.Ct. 1207, 1240, 91 L.Ed.1492 (1947). Despite the petitioners' claims to the contrary, Congress has never sanctioned the "network common control" standard, nor is there any semblance of Congressional intent that such standard be frozen into the administrative process of determining whether joint rates are discriminatory.[9] Thus, the Commission's abolition

[9]Notwithstanding the broad discretion that is necessarily accorded to the Commission in these cases, the petitioners offer two arguments to show that the adoption of the actual common control is contrary to legislative intent.

First, the petitioners argue that Congress adopted the "network" common control analysis because it made certain amendments to the

of the network common control presumption, and its new practice of requiring proof of actual joint control, is not shown to be a matter not entrusted to the Commission's sound discretion.

Likewise, the Commission clearly explained its departure from previous policy so that we may determine whether its decision is arbitrary and not irrationally founded. The Commission provided extended discussions of the actual common control standard in both *Wheat* cases, in its Federal Register annoucement of reopening of the *Corpus Christi I* cases, and in the *Corpus Christi II*

Act after various alleged "network" common control were decided, and did not challenge "network" control analysis. Even if we are to assume that the cases that the petitions cite were true "network" common control cases, we cannot accept the peititioners' argument that all former administrative policy, practice, and regulation are, in effect, "frozen" every time Congress amends or enacts a statute without disputing the current corpus of agency jurisprudence.

Second the petitioners claim that Section 202(f) of the Railroad Revitalization and Regulatory Reform Act of 1976, (the "4R Act"), 49 U.S.C. § 10711, precludes the Commission from changing its policy. Section 10711, provides that ratemaking amendments in the 4R Act should not be construed to modify the application of Section 10741(b). The petitioners conclude from this that Congress impliedly adopted the "network" common control analysis, thus precluding agency abolition of the "network" common control presumption.

There is nothing in the 4R Act to indicate that Congress wished to do anything to upset Commission discretion in discrimination cases; rather, Section 10711 provides only that the 4R Act is not meant to affect the discrimination statute. In addition, although section 101(b)(3) of the 4R Act was not included when the Interstate Commerce Act was recodified in 1978, it is nevertheless helpful in interpreting the effect of the 4R Act *generally*. Section 101(b)(3) of the 4R Act provides that Congress intended to "permit railroads greater freedom to raise or lower rates for rail services in competitive markets." Abolishing the "network" common control presumption certainly tends to effect that policy.

decision itself. The Commission explained that its network common control standard was tantamount to a presumption that imposed strict liability on carriers for the existence of rate disparities. The Commission now wishes to abandon the network common control standard, and adopt a standard that will impose liability only when there is *actual* control, to accord with actual fact rather than resulting from an arbitrary presumption.

Thus, the Commission has determined upon an analysis to be utilized that it deems to be appropriate for the decision of discriminatory rate protests, a matter within its statutory authority. The adoption or change of a method of analysis to be used in the administrative decision of such matters is not shown to be beyond the discretion entrusted to the Commission in its administration of matters statutorily regulated by it. The Commission has clearly articulated a non-arbitrary basis for the method of analysis adopted by it. Finding these criteria are met, judicial review extends no further. We affirm the order in question.

The petitioners produce seemingly endless arguments about the "evils" of the actual control standard. All of these arguments, however, assume that our court may engage in broad review and substitute its judgment for that of the well-reasoned decision of the Commission. We may not.

II. *The Procedural Attack upon the 1980* Corpus Christi II *Vacation of the 1954 and 1961* Corpus Christi I *Decisions.*

In 1979, the Commission reopened the 1954 and 1961 *Corpus Christi I* decisions to determine whether they should be modified and to consider whether the Commission should move from a conclusive presumption of net-

work common control to an analysis of actual control as had been previously discussed in *Wheat II.* The Commission did so after service and after publication of notice (see note 7), in procedures that fully complied with the rulemaking requirements of the Administrative Procedure Act. See *Corpus Christi II,* 364 I.C.C. at 271-72. Ultimately, the reopening led to the Commission's 1980 *Corpus Christi II,* which not only adopted the new actual control standard (see Part I of this opinion), but also to vacation of the *Corpus Christi I* 1954 and 1961 decisions.

The petitioners mount a procedural attack upon the vacation of these prior orders. They contend that in the 1980 reopening of the *Corpus Christi I* case, the Commission should have proceeded by adjudication and not by rulemaking and that the vacation of the *Corpus Christi I* orders were improper. We find no merit to these contentions.

The choice between rulemaking and adjudication "is one that lies primarily in the informed discretion of the administrative agency." *S.E.C. v. Chenery Corporation,* 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947). The Commission is given rulemaking power in section 10321 of the Act,[10] and the Commission may choose to use its rulemaking power as long as it does not abuse its discretion in so doing.

The Commission argues, and we accept, that rulemaking was particularly appropriate in this case because the purpose of re-opening the *Corpus Christi I* cases was to consider the adoption of a new standard of common control that would transcend the interests of the particular

[10]Section 10321 states: "The Commission may prescribe regulations in carrying out this subtitle."

petitioners and carriers originally involved in the *Corpus Christi I* cases. Further, the petitioners have not shown any harm as a result of the agency decision to proceed by rulemaking.

The Commission was entirely reasonable in giving all interested parties an opportunity to comment on agency policy and the Commission did not abuse its discretion in deciding to proceed by rulemaking.

Similarly, the Commission did not act improperly in vacating the *Corpus Christi I* orders. The Commission has authority to reopen cases at any time, and the petitioners' claim that the cases should not be reopened simply because they were decided 18 and 25 years ago is without merit. *Cf., American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532, 540, 90 S.Ct. 1288, 1293, 25 L.Ed.2d 547 (1970). The Commission's vacation of the earlier continuing orders that conflicted with its new policy may reasonably be considered an appropriate method within the Commission's discretion by which it could implement its adoption of the new actual common control standard.

The petitioners' claim that the vacation was improper because it imposes retroactive liability is mistaken, because no retroactive liability was imposed. The original *Corpus Christi I* orders applied prospectively, and the only effect of the adoption of the new standard of actual common control is to permit unequalized rates in the future where no actual common control in fact exists. (If such unequalized rates are in fact proposed, the petitioners of course still have adequate remedy to protest them upon any grounds accorded by law.)

The petitioners' final claim that the Commission should

not have vacated the orders without determining whether common control to Corpus Christi exists under the new standard is without merit. As the Commission points out, the effect of vacation is not to change rates currently on file. If carriers subsequently initiate rate changes, they can be examined on an individual basis.

Conclusion

For the reasons stated:

(1) We DISMISS petitions in our docket nos. 78-1348, 79-1816, and 80-1842, which attack the *Wheat* adjudications that rejected Corpus Christi claims of discriminatory rates, as MOOT.

(2) We AFFIRM the orders complained of by the petition in our docket no. 80-1843, finding that these orders, (a) adopting the new actual control standard and (b) reopening and vacating the 1954 and 1961 *Corpus Christi I* orders, were procedurally proper and within the Commission's authority and discretion.

DISMISSED AS MOOT IN PART: AFFIRMED IN PART.

APPENDIX

The Consolidated proceedings before us result from four petitions for review of Interstate Commerce Commission, ("the Commission" or "the I.C.C.") orders:

1. Our docket number 78-1348, being a petition filed by the Nueces County Navigation District No. 1, Corpus Christi ("Nueces County"), a political subdivision of the State of Texas, which seeks review of a report and order of the Commission dated December 19, 1977, *Wheat, Oklahoma and to Kansas to Texas Gulf Ports,* I.C.C. docket no. 36491 (Sub-No. 1), 357 I.C.C. 382 (1977), a decision that held that the reduced rates of wheat from points in Oklahoma and Kansas to various Texas ports was not unduly preferential to them nor prejudicial to the Corpus Christi port. We will refer to this decision as *Wheat I.*

2. Our docket number 79-1816, a petition by Nueces County and by Producers Grain Corporation ("Producers Grain"), a regional grain marketing association of Amarillo, Texas, which seeks review of an I.C.C. decision of February 2, 1979, *Wheat, Oklahoma and Kansas to Texas Gulf Ports,* I.C.C. docket no. 36491 (Sub-No.1), 359 I.C.C. 592 (1979), which (after reopening *Wheat I*) reaffirmed its action on broader basis. We will refer to this decision as *Wheat II.*

3. Our docket number 80-1842, another petition by Nueces County and by Producers Grain, which seeks review of an I.C.C. decision dated July 21, 1980, *Nueces County Nav. Dist. No. 1 v. Abilene & Southern Ry. Co.,* I.C.C. docket no. 31098 (but also embracing I.C.C. docket nos. 33447 *Nueces County Nav. Dist. v. Atchison, T & S.F. Ry.,* and 36491 (Sub-No. 1), *Wheat Oklahoma*

and Kansas to Texas Gulf Ports), 364 I.C.C. 269 (1980)), a decision that:

(a) vacated earlier orders in I.C.C. docket nos. 30918, *Nueces County Navigation District No. 1 v. Abilene and Southern Railway Company,* 291 I.C.C. 459 (1954), and in docket no. 33447, *Nueces County Navigation District v. Atchison T & S.F. Railway Company,* 315 I.C.C. 155 (1961) – to be referred to as the *"Corpus Christi I"* cases. These previous decisions had held joint rail rates discriminatory as to Corpus Christi based upon the Commission's former presumed "common control" rule;

(b) held that a new "actual control" (of a discriminatory rate) standard, adopted in the opinion, shall be used in the determination of unreasonable discrimination in future challenges to carrier rate adjustments to the ports in these proceedings instead of a former presumed "common control" of joint rates that were discriminatory; and

(c) affirmed the decision in *Wheat I* and *II, supra,* insofar as it applied the actual control analysis, but modified its discussion relative to rate *prescription* in the absence of common control. We will refer to this decision as *Corpus Christi II.*

By this petition for review, Nueces County and Producers Grain reiterate their objections to the holdings in *Wheat I* and *II* and reaffirmed in *Corpus Christi II,* that the reduced rail rates of wheat to various Texas ports were not discriminatory to the Corpus Christi port.

4. Our docket number 80-1843, is yet another petition by Nueces County and by Producers Grain that seeks review of the same July 20, 1980 I.C.C. decision, *Corpus Christi II, supra,* but which in this instance attacks the

reopening of the earlier 1954 and 1960 Nueces County decisions (the (a) holding above), and also attacks the decision's adoption of the new "actual control" standard in the above (b) portion of the ruling.

A number of parties have intervened in the proceedings before us.

In support of the respondent Commission, the following rail carriers intervened: The Missouri Pacific Railroad ("MoPac"); the Southern Pacific Transportation ("Southern Pacific"); the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe"); and Burlington Northern Inc. (successor in interest to the St. Louis-San Francisco Railway Company – the "Frisco" Railway). Houston Port Bureau, Inc., also intervened in support of the respondent Commission's orders.

The Bunge Corporation and the Louis Dreyfus Corporation ("Dreyfus") intervened in support of the petitioners, Nueces County and Producers Grain.

APPENDIX B

No. 36491 (SUB-No. 1)

WHEAT, OKLAHOMA AND KANSAS TO TEXAS GULF PORTS

Decided December 19, 1977

Reduced rates on wheat from points in Oklahoma and Kansas to Galveston, Houston, Texas City, Beaumont, and Port Arthur, Tex., for export found not to be unduly preferential of those ports and prejudicial to Corpus Christi, Tex., or otherwise unlawful. Proceeding discontinued.

Donald E. Engle, Hugh L. McCully, Donald E. Ranson, and Donal L. Turkal for respondents.

Frank C. Brooks, Andrew P. Goldstein, and *Raymond R. Nolen* for protestants.

G. E. Strange for intervener in support of respondents.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

By schedules effective February 20, 1977, respondent, St. Louis-San Francisco Railway Company (Frisco or respondent) published reduced carload rates[1] from 1 to 3 1/2 cents lower than previously effective rates on wheat from

[1]Rates are stated in amounts per hundred pounds.

origins to Oklahoma and Kansas[2] to the Beaumont, Galveston, Houston, Port Arthur, and Texas City, Tex., ports for export, but not to the port of Corpus Christi, Tex. Prior to the reductions, the Frisco maintained identical rates to all the above destinations. Upon protest of Louis Dreyfus Corporation (Dreyfus) and the joint protest of Nueces County Navigation District No. 1 (District) and Producers Grain Corporation (Producers), all of which represent Corpus Christi interest, and protest of Texas Grain and Feed Association (Texas Grain), representing various Texas grain elevators and feed mills, the investigation of the proposed rates was entered into by order dated February 16, 1977 (served February 24, 1977). Because Frisco claimed in initial statements that the failure to afford reduced rates to Corpus Christi was due to the nonconcurrences by the Missouri Pacific Railroad Company (MoPac or MP) and Southern Pacific Transportation Company (Southern Pacific or SP), we broadened the investigation by order dated August 4, 1977, to designate these carriers as respondents.

In our initial consideration of the evidence, we found significant questions had been raised as to the possible preferential treatment of the Beaumont, Galveston, Houston, Port Arthur, and Texas City ports and the possible prejudicial treatment of the port of Corpus Christi, a situation which would violate section 3(1) of the act. One of the elements to establish a section 3(1) violation is that the originating carrier has control of both the preferred and prejudiced rates. Respondent alleged in its initial statement that it did not have common control over both

[2]Arkansas City and Winfield, Kans., and Bender, Blackwell, Eddy, Goltry, Grainville, Helena, Lamont, Middletown, Peckam, and Salt Fork, Okla.

the allegedly preferred and prejudiced rates since it could not force connecting lines to concur.

In situations where one railroad serves one port directly and the other port by joint service with a second railroad, this Commission has stated that a carrier does not have common control if it offers to establish equivalent service at equivalent rates, but the connecting carrier declines. *Corn & Soybeans Midwest to Gulf Ports,* 349 I.C.C. 1, 4 (1974). The initial statements showed that the Frisco requested concurrences from other carriers, some of which concurred while others did not.

In our order dated September 8, 1977, we stated that we were no longer satisfied that offers of divisions by originating carriers are sufficient by themselves to demonstrate a willingness to provide equivalent service at equivalent rates, unless it is clearly and convincingly shown by the carriers that these offers were made in good faith. The order further stated:

> Without such a showing, the originating carrier may predicate the lower joint rate upon a division of revenues which substantially reduce the share of the connecting carrier or carriers. By so doing the origin carrier could virtually compel the non-concurrence of the connecting carriers. In order to establish that it has made good faith offers of divisions with non-concurring railroads, respondent should submit evidence showing: (1) the amount and proportion of the offer of divisions in the case at issue; (2) the amount and proportion of the established basis of division, if any, on the particular commodity and over the particular route; and (3) the amount and proportion of the established basis of divisions and identical or comparable commodities

over identical or comparable routes. Respondent may also submit any other evidence, including cost data, to support its case.[3]

Respondent Frisco depicts the reduction as necessary to meet the direct competition of The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and the Chicago, Rock Island and Pacific Railroad Company (Rock Island), both of which published similar reduced rates on wheat.

In Investigation and Suspension Docket No. 9132, *Wheat, Kansas and Oklahoma to Texas Gulf Ports,* decided February 7, 1977,[4] the Santa Fe's reductions were found just and reasonable and not otherwise in violation of the Commission's order in docket No. 31098, *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.,* 291 I.C.C. 459 (docket No. 31098) and docket No. 33447, *Nueces County Nav. Dist. No. 1 v. Atchison, T. & S. F. Ry. Co.,* 315 I.C.C. 155 (docket No. 33447).

Frisco refers to the testimony in I.&S. Docket No. 9132, wherein Santa Fe justified its reductions on the basis that successive general increases had increased the rail rates to the extent that motor carrier competition was becoming a significant factor. Frisco claims that, while it is affected by motor carrier competition, it is more directly affected by the reduced Santa Fe and Rock Island rates. Maps submitted by Frisco illustrate the close proximity of Frisco's, San-

[3]This criteria was subsequently modified to require (1) information relevant to the offer of divisions in the issue case and (2) information relevant to any established bases of divisions on similar or identical commodities over similar or identical routes. Supporting detail, including cost data, proportional rates, or other basis for divisions offers can be submitted.

[4]Appeal docketed *sub nom., Producers Grain Corporation* v. *Interstate Commerce Commission,* No. 77-1788 5th Cir.

ta Fe's, and Rock Island's lines. Respondent draws the conclusion that without these reductions, wheat will move either by the competing rail carriers or trucks.

Union Equity Co-Operative Exchange (Union Equity), which supports the reduction herein, is a regional cooperative with 226-member elevator organizations located in 7 States, and has elevators totaling 50.3 million bushels storage capacity at Enid, where a considerable amount of grain is stored during the harvest season. Enid, Okla., located no further than 90 miles from the involved origins, is an important transit point for the grain trade. Union Equity also has elevators at Forth Worth and Houston, Tex., with capacities of 5 and 6.5 million bushels, respectively.

The table below shows the amount of grain handled by the Frisco from all origins to Enid and from Enid to various gulf ports.

St. Louis-San Francisco Railway Company
shipments handled to and from Enid, Okla.

	1973	1974	1975	1976
All origins to Enid, Okla	640	1,093	1,276	2,125
Enid to Beaumont, Tex	446	503	295	54
Enid to Corpus Christi, Tex.	14	32	70	111
Enid to Galveston, Tex	37	63	105	351
Enid to Houston, Tex	2,584	2,118	2,503	2,055
Enid to Port Arthur, Tex	14	62	11	31
Total Enid to the Texas ports ...	3,095	2,778	2,984	2,602

Union Equity argues that general increases have distorted the rate structure between various "rate-break" border points, so that in one instance stations only 6.6

miles apart have seen an increase from a 2-cent differential (30 and 32 cents) between the two stations in 1968 to a 4-cent differential in 1977 (66 and 70 cents). The issue rates would reduce this individual differential 1.5 cents (66 and 67.5 cents). These differentials in the transportation costs force the disadvantaged elevators either to absorb the rate differential or obtain a cheaper means of transporting their wheat, purportedly by trucks. Evidence was also presented to show that wheat has moved via truck from nine of the involved origins to both Enid and Houston.

The Houston Port Bureau, Inc., which represents the port of Houston in transportation matters, includes in its membership organizations which own elevators with total capacity of 27 million bushels. It argues that the Frisco must be permitted to meet both rail and motor carrier competition. It also contends that since the port of Houston has more available capacity than protestants, it will draw more export grain through its facilities. In order to accomplish this, it states that competitive rates must be available.

As stated, protestants to this proceeding include the District and Producers, both of which filed a joint statement, and Dreyfus, and Texas Grain. Producers is a regional grain marketing cooperative association with 6.4 million bushel capacity elevator located at Corpus Christi. The exporting of bulk grain through the Corpus Christi port is one of Producers' principal operations, with wheat accounting for 31.3 percent of the total volume from 1972 through 1976. Producers' witness has testified that the Commission decisions in docket Nos. 31908 and 33447, *supra,* were a major factor in Producers' decision to purchase its Corpus Christi elevator facility.

Producers testifies that the rate reductions work out to 6/10 of 1 cent to 2.1 cents per bushel and that, other factors being equal, a difference of a fraction of a cent per bushel will determine if a contract will be made between buyer and seller.

Producers acknowledges that it cannot directly identify the quantity of wheat it has received in the past from the issue origins, but points out that since wheat loses its origin identity when loaded into a terminal elevator, it is possible that a substantial amount of wheat originated at the issue origins. According to its corporate records, from 1972 through 1976 there were over 8,600 railcars containing wheat billed at Wichita, Kans., Enid and Fort Worth which were unloaded at the Corpus Christi terminal. As further evidence of its need for the reduced rates, Producers submits that it has obtained 11 new members in Kansas and Oklahoma since January 1, 1976, although it does not state whether those members are affected by the reductions herein.

In attempting to obtain the issue rates to Corpus Christi, Producers contacted both MoPac and Southern Pacific and requested their concurrence in the (then) proposed rates. MoPac refused on the basis that "(d)etailed study of economics involved prohibits our participation in joint routes." Southern Pacific provided a similar explanation:"***this publication does not generate sufficient revenues to cover cost of performing services."

Producers criticizes these refusals and refers to MoPac's and Southern Pacific's participation in joint-line rates from Texas origins to Corpus Christi and Laredo, Tex., for export. According to protestant, for traffic in which MoPac and Southern Pacific concur, revenues for wheat, 110,000-pound minimum, range from $1.08 to $1.24 (average $1.15) per car-mile while the revenues provided

by the reduced rates at issue, 150,000- and 190,000-pound minima, would yield from $1.06 to $1.64 (average $1.38) per car-mile.

District operates facilities at the port of Corpus Christi, including a shipside grain elevator with a 5.6 million bushel capacity.

District states that most wheat coming from Kansas and Oklahoma is shipped to Corpus Christi from terminal rather than country elevators. It points out that while the reduced rates at issue originate at country elevators, most of the wheat from these origins will ordinarily move into a terminal elevator, such as located at Enid. Thus, although the Frisco originated 111 cars in 1976 for shipment from Enid to Corpus Christi, it would not be possible for the District to ascertain how much of this wheat, if any, came from the involved origins. Rate comparisons have been submitted to demonstrate that the reduced rates, effective February 20, 1977, and subject to the Ex Parte No. 336 increase, are between 0.5 cent below to 2 cents above the Ex Parte No. 330 level effective October 7, 1976. Because all the carriers participated in these rates at the Ex Parte No. 330 level, District implies these carriers should publish the reduced rates since they would generally furnish revenues above the Ex Parte No. 330 level.

Dreyfus argues that the Frisco claim of motor carrier competition has not been sustained by independent evidence, but that the principal reason behind Frisco's rate reductions is the Commission decision in I.&S. Docket No. 9132, *supra,* wherein similar reductions were granted to the Santa Fe. Since the Frisco's reduced rates were published to become effective February 20, 1977, the end of the suspension period in I.&S. Docket No. 9132, and not before, Dreyfus believes that these rates are published as a direct response to the Santa Fe rate reductions.

Protestants, in their respective arguments, contend that the rates violate the existing orders of docket Nos. 31098 and 33447, *supra*. Producers, District, and Dreyfus contend that the main issue is whether a carrier can avoid the port equalization orders or the constraints of section 3(1) when, through independent action, it only has to state that it is willing to join its connections in publication of the reduced rates. Since Frisco does not reach any gulf ports nor do MoPac and Southern Pacific directly serve any of the origins, Producers and District contend that the joint-line rate is not controlled by any particular party, but that the rate is collectively controlled by all the parties to the rate. It is also alleged that there are no transportation conditions which justify the higher rates. Producers and District also argue that the reduced rates violate section 1(4) of the act which requires railroads to maintain just and reasonable rates and reasonable routes.

In its reply, Frisco has extended its exhibit showing the number of cars from the involved origins to the transit points of Wichita and Fort Worth. A total of 270 cars of wheat moved from the origin points to the transit points between 1973 and 1976, while during this same period 65 and 86 carloads of wheat moved from Forth Worth and Wichita, respectively, to Corpus Christi.

Frisco criticizes Producers' presentation because it only showed the wheat coming from the transit points and not the specific origins involved in this proceeding. Other figures were criticized because they related to grain in general and not wheat specifically.

Frisco argues that if this rate decrease is denied, protestants would not benefit since the wheat traffic handled by Frisco will instead be handled by the Santa Fe, the Rock Island, and motor carriers. With respect to motor

carrier competition, it is alleged that this competition, described in I.&S. Docket No. 9132, *supra,* has radically changed since docket Nos. 31908 and 33417 which were decided in 1953 and 1961, respectively. Frisco refers to the development of an extensive interstate highway system and the heavy trucks which use this system.

Division and Costs of Service

In its initial presentation, Frisco presented cost evidence relating to the through movement. On reopening the record, Frisco submitted testimony detailing its present and proposed offers of divisions. In response to this latter testimony, Dreyfus costed the service for each carrier and related these costs to the present and proposed offers of divisions.

In developing its cost evidence for the through movement, Frisco selected Helena and Winfield because they represented the shortest and longest distances, respectively, to Enid. The evidence was based on wheat shipments transited at Enid and moving under carload minimum weights of 150,000 and 190,000 pounds. Variable costs were based on the application of the Commission's Rail Form A, Statement No. 1F1-73, "Formula for Use in Determining Rail Freight Service Costs" to the 1975 expenses and statistics of those rail carriers assigned to region VII (Western District). Respondent adjusted those regional average costs for weight, switching costs and charges, interchange and through train, and way train movements. District and Producers criticized this cost presentation and state that the study should have been based on the unit costs of the actual railroads and that an actual average lading weight of 200,000 pounds should have been used. However, respondent and protestants are in agreement that the reduced rates are profitable.

It should be noted that we are unable to verify the 1975 costs computed by respondent. Additionally, respondents' evidence has several deficiencies. The carriers are region V carriers except for Southern Pacific, which is a region VI carrier. Furthermore, respondent failed to explain the procedures it used to update its costs and the methods it used in adjusting the 1975 unit costs to reflect tare weight and terminal switching adjustments.

We have developed costs from Winfield and Helena to Corpus Christi based on statement No. ICI-74, "Carload Cost Scales, 1974." Adjustments have been made to reflect the following specific movement characteristics: tare weight, way and through train costs, actual interchange costs on a loaded car-mile basis, inclusion of an absorbed switching cost on movement to Galveston, and a 50-percent reduction in origin and destination terminal switching costs and freight train costs reflecting the economics associated with multiple car movements. Our restatement is shown below.

Costs, rates and rate/cost comparisons as computed by the Section of Cost and Valuation as well as respondent's variable cost computations

Movement description	Actual miles	Weight (pounds)	Frisco's variable cost computations January 1977 cost level	Variable cost per carload at September 30, 1976 cost level[1]	Total revenue per carload	Revenue/cost comparison col. 6 ÷ col. 5
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Winfield, Kans., Transit Enid						
1. Enid to Galveston	859.7	150,000	$945.56	$834.31	$1,192.50	143
2. Enid to Houston	807.6	150,000	919.83	779.90	1,192.50	153
3. Enid to Galveston	801.5	150,000	906.35	797.93	1,192.50	149
4. Enid to Houston	749.4	150,000	880.62	743.53	1,192.50	160
Helena, Okla., Transit Enid						
5. Enid to Galveston	837.3	190,000	991.85	886.23	1,282.50	145
6. Enid to Houston	746.7	150,000	862.80	726.97	1,012.50	139
7. Enid to Galveston	826.8	190,000	983.83	878.79	1,282.50	146
8. Enid to Houston	688.5	150,000	823.59	690.60	1,012.50	147
Winfield, Kans., Transit Enid						
9. Enid to Corpus Christi	925.7	190,000	1,087.81	977.63	1,510.50	155
10. Enid to Corpus Christi	969.5	190,000	1,034.27	1,009.74	1,510.50	150
11. Enid to Corpus Christi	1,009.4	150,000	1,055.78	906.03	1,192.50	132
Helena, Okla., Transit Enid						
12. Enid to Corpus Christi	864.8	190,000	1,022.39	917.01	1,282.50	140
13. Enid to Corpus Christi	908.6	190,000	968.85	949.12	1,282.50	135
14. Enid to Corpus Christi	948.5	150,000	998.75	853.10	1,012.50	119

See footnote at end of table.

[1]Costs were updated to the September 30, 1976 cost level utilizing the Commission's suggested update procedure outline in I.C.C. Statement No. 2-58, "Rail Carload Cost Scales by Territories as of January 1, 1958."

As the restatement shows, the reduced rates contribute substantial revenues above variable costs.

As previously stated, we requested information as to the offered divisions. Frisco has complied by submitting the divisions as used on the present rates and those proposed to MoPac and Southern Pacific. Protestants have analyzed this evidence, relying on costs and comparisons of car-mile revenues.

The statements submitted by respondent are contained in appendixes A and B. Appendix A shows the divisions between respondent and MoPac in percentages and in revenues, both present and proposed, and compares the divisions from the issue origins to Houston and Corpus Christi. Twenty-four rates are shown; only six involve reductions, but all are on rates to Corpus Christi. These reductions range from 0.2 to 0.7 cents, while Frisco's share is reduced in all instances and varies from 0.7 to 3.5 cents. The statement for the Southern Pacific (appendix B) involves only the Corpus Christi destination. All the rates to Corpus Christi have reductions which range from 0.3 to 1.1 cents. Frisco's share is again reduced in all instances, the reductions ranging from 0.6 to 2.4 cents.

Frisco has testified that the divisions offered to the connecting carriers reflect the same percentage divisions as previously concurred in by the connecting carriers.

Southern Pacific states that its participation in any rate adjustment is conditioned on its earnings for those rates. This carrier emphasizes that it is not the normal railroad pricing procedure of carriers operating in this particular geographical territory to become involved in questions regarding divisions each time a rate change is being considered, because to adjust those divisions each time a rate is reduced would result in unmanageable situations. Only on rare occasions is a special basis of divisions agreed upon which alters the prevailing basis, and in many cases those changes are related only to additional routings on present rates. Southern Pacific points out that the subject rates were progressed by independent notices and that Corpus Christi delivering lines were not consulted as to the level of rates to be established nor were they ever advised as to the reasons that Frisco felt it was imperative to publish the reduced rates. It is Southern Pacific's position

that had it been consulted, it would have advised the Frisco that the rates should not be progressed because revenues accruing for Southern Pacific's account were less than Rail Form A variable costs for the service. Southern Pacific also has testified that the Frisco has never made any offer of revised divisions. Southern Pacific alleges that its variable cost from its connection with the Frisco at Fort Worth to Corpus Christi is 26.22 cents in a rail-owned covered hopper car with net load of 190,000 pounds contrasted with the 24.6 cents share of the revenue the Frisco has proposed to allow Southern Pacific for this service.

Protestants, District and Producers, in their joint statement dated October 17, 1977, provided a table depicting total railroad mileage from the 12-named origins to Corpus Christi, Tex. From each origin the mileage is stated to reflect (1) Frisco's mileage from origin to interchange point at Fort Worth or Dallas, Tex.; (2) MP mileage from Fort Worth to Corpus Christi; and (3) SP mileage from Dallas to Corpus Christi. Also shown are Frisco's, MP's, and SP's percentage distribution of the total mileage and, in a subsequent table, protestants have calculated Frisco's percentage share of the total through revenues. Furthermore, in response to Frisco's second opening statement, those protestants have presented certain selected car-mile earnings from various origins. Such revenue data was extracted from respondent, Frisco's showing of divisions and minimum revenues from the involved rail carriers.

Protestant Dreyfus submitted a study of the variable costs associated with the movement of the subject traffic from 12 Frisco origins to Houston, Galveston, Port Arthur, and Corpus Christi, Tex. Cost data relative to fully allocated costs have also been presented, as well as a comparison of the proposed revenue divisions with the variable costs for each of the participating carriers.

Costs submitted by Dreyfus are based on 1975 Rail Form A territorial average costs for regions V and VI, updated to reflect wage and price levels as of April 1977. The development of such costs reflects movements of wheat in covered hopper cars carrying a net load of 200,000 pounds. Mileages were based on tariff route distances furnished by Louis Dreyfus Corporation. The study also includes switching costs of the Houston Belt and Terminal Company (HB&T) and the Port Terminal Railroad Association (PTRA) at the Houston destination, as well as a switching charge of $42.24 per carload made by the Galveston Wharves Railroad.

Dreyfus has also included the cost applicable to interchange switching for the movement from Frisco to the switching lines at Galveston and Houston, that is, interchange with HB&T, PTRA, and Galveston Wharves Railroad.

Regarding interchange costs at Corpus Christi, Dreyfus notes that the service to the public elevator is provided every third year by either the SP, MP, or Texas-Mexican Railway. Switching service to the private elevator, operated by Producers Grain Corporation, is provided by MP. Accordingly, Dreyfus included the costs of only one-third of an interchange on SP movements to Corpus Christi, since SP incurs one full interchange cost every 3 years. On movements via the MP to Corpus Christi, Dreyfus included a weighted average of one-third an interchange for that carrier since there is no interchange involved in the movement to Producers' elevator and only two-thirds of an interchange involved on movements to the public elevator.

Dreyfus' cost witness has updated 1975 Rail Form A variable costs to an April 1977 cost level using the index computed by the Western Railroad Association, adjusting

the index downwards slightly so that it may be applicable to Rail Form A costs which include not only operating expenses, rents, and taxes, but also the cost of capital.

After computing the variable costs applicable to the issue traffic, Dreyfus developed a table depicting the rates, variable costs, and rate-cost comparisons for through movements originating on the Frisco, at Winfield and Helena, to the gulf ports of Galveston, Port Arthur, Houston, and Corpus Christi. Data were shown separately for shipments with one transit stop at Enid and for nontransit shipments. This data indicate that on transited movements from the two origins, the proposed reduced rates produce ratios of revenues to variable cost ranging from 120 to 149 percent on the through movement. On nontransit shipments, the reduced rates range from 139 to 175 percent of through movement variable costs.

Dreyfus has also computed the average ratio of rate to variable costs for these movements. These computations are alleged to show that the ratio of the average rate to variable costs ranges from 128 to 139 percent on transited shipments and 148 to 164 percent on nontransited shipments. Dreyfus concludes that the reduced rates involved in this proceeding cover the railroads' fully allocated costs (based on the allocation of constant costs on a dollar basis) since an examination of Rail Form A application for regions V and VI indicates that the total constant expenses amount to approximately 28 percent of total variable expenses.

In addition to presenting evidence relating to the compensatory nature of the through movements, Dreyfus has also submitted variable costs per hundredweight and applicable divisions for the Frisco's portion of the haul via the various routes to Corpus Christi, as well as the con-

necting carriers' portion of the haul. The results of this showing are set forth below:

Origin and routing	Variable cost cents per cwt.		Revenue division cents per cwt.		Ratio: revenue to variable cost	
	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Winfield, Kansas					*Percent*	*Percent*
Frisco-Dallas-SP	34.2	23.7	54.9	24.6	161	104
Frisco-Ft. Worth-SP	35.1	24.6	54.9	24.6	156	100
Frisco-Ft. Worth-MP	35.1	24.2	54.5	25.0	155	103
Helena, Oklahoma						
Frisco-Dallas-SP	30.9	23.7	45.9	21.6	149	91
Frisco-Ft. Worth-SP	31.8	24.6	45.9	21.6	144	88
Frisco-Ft. Worth-MP	31.8	24.2	44.2	23.3	139	96

According to Dreyfus' tables the revenue divisions allowed to the connecting carriers produce revenues which are below, or only marginally higher than, the variable costs incurred by the connecting carriers. Furthermore, Dreyfus notes that the costs, shown for Frisco, include the cost of transit and if no transit was provided, Frisco's costs would be almost 8 cents per hundredweight lower. As a result, Frisco's division of the revenue would be even more remunerative.

Although SP attempted to show some evidence relative to costs of service consideration, it provided no support or explanation of the variable costs it introduced. However, the variable cost SP shows for the movement from Winfield, Kans., to Corpus Christi, Tex., with interchange at Forth Worth is only slightly higher than the variable cost computed by protestant Dreyfus for the same movement,

(i.e. 26.22 cents compared to 24.6 cents). Accordingly, we believe the variable costs shown by SP is not unreasonable.

We are unable to verify the cost presented by Dreyfus since the Commission's most recent Rail Form A reflects only those costs for the year 1974. However, we find protestant's cost methodology to be acceptable for the most part. Dreyfus' use of an average actual lading weight more appropriately reflects the costs incurred in handling the issue traffic since costs are predicated upon the actual weight being transported rather than the tariff minimum weight. Dreyfus' exclusion of regional average switching costs at destination and its inclusion of switching charges paid to terminal switching companies, at Houston and Galveston, is acceptable.

Based on the routings shown in Dreyfus' cost study, it appears that the number of interchanges was overstated. However, we have not restated the cost applicable to the through movements since such restatement would not alter the showing that revenues exceed variable costs on those movements by substantial margins.

With respect to the interchange reflected in the cost of movements from either origin to Corpus Christi, Dreyfus has improperly computed the cost of providing service in any given year. The use of average interchange costs understates the total costs of providing service in a year in which MoPac or Southern Pacific must interchange the traffic to the public elevator. Furthermore, average interchange costs overstate the total costs in a year on which MoPac or Southern Pacific serve the public elevator directly. Accordingly, we have restated the costs shown by Dreyfus to reflect actual interchange costs incurred by the involved carriers in the movement to Corpus Christi. Our

restatement is shown below and reflects revenues and costs in cents per hundredweight for the Frisco as well as the connecting carriers. It should be noted that protestants' use of one-third of an interchange cost would reflect the appropriate expense incurred by the connecting carriers if one were examining the cost of service for a 3-year period.

Origin and routing	Variable cost cents per hundredweight		Present: Revenue division cents per hundredweight		Present: Ratio: revenue to variable cost		Proposed: Revenue division cents per hundredweight		Proposed: Ratio: revenue to variable cost	
	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Winfield, Kansas					*Percent*	*Percent*			*Percent*	*Percent*
Frisco-Dallas-SP										
(a) Delivery to public elevator by SP	33.5	22.4	55.5	25.0	166	112	54.9	24.6	164	110
b) Delivery to public elevator by MP or Tex-Mex	33.5	23.2	55.5	25.0	166	108	54.9	24.6	164	106
Frisco-Ft. Worth-SP										
a) Delivery to public elevator by SP	34.5	23.3	55.5	25.0	161	107	54.9	24.6	159	106
b) Delivery to public elevator by MP or Tex-Mex	34.5	24.1	55.5	25.0	161	104	54.9	24.6	159	102
Frisco-Ft. Worth-MP										
a) Delivery to public elevator by MP	34.5	23.1	55.2	25.3	160	110	54.5	25.0	158	108
b) Delivery to public elevator by SP or Tex-Mex	34.5	23.8	55.2	25.3	160	106	54.5	25.0	158	105
c) Delivery to private elevator by SP	34.5	23.1	55.2	25.3	160	110	54.5	25.0	158	108

Origin and routing	Variable cost cents per hundredweight		Present: Revenue division cents per hundredweight		Present: Ratio: revenue to variable cost		Proposed: Revenue division cents per hundredweight		Proposed: Ratio: revenue to variable cost	
	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP	Frisco	MP or SP
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Helena, Oklahoma					*Percent*	*Percent*			*Percent*	*Percent*
Frisco-Dallas-SP										
(a) Delivery to public elevator by SP	30.3	22.4	46.6	21.9	153	98	45.9	21.6	151	96
b) Delivery to public elevator by MP or Tex-Mex	30.3	23.2	46.6	21.9	153	94	45.9	21.6	151	93
Frisco-Ft. Worth-SP										
a) Delivery to public elevator by SP	31.2	23.3	46.6	21.9	149	94	45.9	21.6	147	93
b) Delivery to public elevator by MP or Tex-Mex	31.2	24.1	46.6	21.9	149	91	45.9	21.6	147	90
Frisco-Ft. Worth-MP										
a) Delivery to public elevator by MP	31.2	23.1	45.2	23.3	145	101	44.2	23.3	142	101
b) Delivery to public elevator by SP or Tex-Mex	31.2	23.8	45.2	23.3	145	98	44.2	23.3	142	98
c) Delivery to private elevator by MP	31.2	23.1	45.2	23.3	145	101	44.2	23.3	142	101

The results of our restatement do not materially alter the showing made by Dreyfus; that is, the proposed reduced rates produce revenues which approximate variable costs, in some instances apparently failing to cover them, and in other instances slightly exceeding the variable costs of service of the connecting carrier. The revenues exceed the variable costs of the through movement. The cost study presented by Dreyfus reflects the variable costs incurred in movements to the port of Corpus Christi from only 2 of the 12 named origins. However, Frisco has not criticized the study in that regard

Both Frisco and Dreyfus contend that cost study shown by Dreyfus overstates the cost of service. Frisco claims the use of regional average costs do not accurately reflect the cost of terminal services at specific origins and destinations. Dreyfus states its costs are overstated since it did not reflect specific characteristics of the issue traffic movements, but only regional average movement characteristics. Additionally, Dreyfus points out that its costs are also inflated by its failure to reflect economies associated with multiple-car shipments outbound from the transit point. We agree with the contentions made by both parties with respect to such overstatement.

On the reopened record Dreyfus argues that a finding of common control is unnecessary in this proceeding because, if the rates are found to violate section 3(1), our order would not give the origin carrier the option of lowering or raising its rates, but would instead order cancellation of the issue rates. This protestant submits that if common control is a necessary element to establish that these rate reductions violate section 3(1), then we must compel an adjustment in the divisions. It also submits that the rates are highly remunerative on the through bases, and

that a divisions offer which denies the connecting carrier its earnings potential is not in good faith. Alternatively, should this Commission find that respondent acted in good faith in its offers of divisions, then the connecting carriers' rejections of these offers should constitute "bad faith".

District and Producers argue that a bona fide offer of divisions must be fair and equitable and that it is incumbent on respondent to demonstrate this aspect, irrespective of the length of time that the existing basis has been in effect. Frisco states that there are instances where it receives less of its proportionate share of joint revenues than an exact proportionate share of the joint costs would indicate.

Frisco acknowledges that it would appear that perhaps it receives somewhat more than its costs would justify, however, in other situations involving MoPac and Southern Pacific, Frisco receives less. Frisco argues it was not required either explicity or implicity by the order to justify its percent share of the present rates or the share it would receive from the proposed rates, and that the Commission's only purpose in entering the subject order on divisions offers was to assure itself that Frisco was not offering divisions which substantially reduced the shares of the connecting carriers. Frisco believes its evidence is clear that no substantial reductions in revenues would occur to the connecting carriers under the proposed rates as compared to those divisions which those carriers receive under the present rates and that Frisco has not predicated lower joint rates upon a divison of revenues which substantially reduces the share of the connecting carriers. Thus, Frisco criticizes the car-mile earning comparisons of District and Producers because the comparisons do not give recognition to the actual movement of the traffic. Respondent also argues that Corpus Christi is geographically disadvan-

taged because the distances between Helena and Corpus Christi and between Winfield and Corpus Christi are 260 and 250 miles, respectively, greater than between those origins and Houston. Respondent also submits that Corpus Christi could not possibly be damaged since Frisco and other rail carriers are handling to some degree traffic which has allegedly moved in motor carrier service, to other ports Frisco claims that motor carrier service has not been made available to Corpus Christi.

As to Dreyfus' assertion that Frisco is either acting in bad faith in offering divisions to MoPac which diminishes MoPac's revenues or MoPac is acting in bad faith in not accepting the offer if the offered divisions do not diminish MoPac's revenues, Frisco claims it has no explanation for MoPac's refusal to join in rates which do not reduce its revenues but which do substantially reduce Frisco's revenues.

DISCUSSION AND CONCLUSIONS

The statutory burden of proof is on the respondent carriers to demonstrate that the issue rate reductions are lawful. In order to make a finding that these reductions do not violate section 3(1) of the act, as alleged by protestants, the evidence must show that there is not a disparity in rates, that the protestants herein are not actually or potentially competitively injured, that respondent carriers are not the common source of the rates to both the preferred and prejudiced ports, or that the rate disparity, if any, is justified by the transportation conditions. See *Chicago & Eastern Illinois R. Co. v. United States,* 384 F. Supp. 298, 300-301 (N.D. Ill. 1974), affirmed 421 U.S. 956 (1975).

The evidence of record shows that there is a rate disparity of 1 to 3½ cents to the detriment of Corpus Christi and in favor of the other gulf ports. As the testimony shows, the nature of grain pricing is such that contracts to purchase wheat are affected by price considerations in fractions of a cent. This rate disparity, then, can and will adversely affect a potential buyer's ability to procure wheat for shipment to Corpus Christi. Although respondent states that other factors affect the ability to procure wheat, this statement is entitled to little weight without a factually supported statement concerning what those factors are and what effect they will have.

Frisco objects to Producers' evidence that Producers has received traffic from the origin area as inadequate because the evidence only shows that wheat has been received from terminal stations which receive shipment from the involved origins, and not what the specific origins are. The failure to reflect the origin is explained by Producers' statement that normally wheat loses its origin identity when it is unloaded at a terminal elevator. While the terminal elevators receive wheat from origins other than involved herein, the evidence still indicates that substantial amounts of wheat had been received from the involved origins. We note the absence of any testimony that the terminal elevators receive only a small portion of their traffic from those origins.

We conclude that there is sufficient evidence to demonstrate that Producers, District, and Dreyfus, have suffered an actual or potential injury.

In regard to common control, in prior cases the Commission has found that where the origin carrier proposed an equal joint rate to Corpus Christi, and made an offer of divisions of revenue to a connecting carrier to Corpus

Christi, but the connecting carrier did not concur in the joint rate, that the origin carrier was found not to have "control" over the rate to Corpus Christi. I.&S. 9132, *Wheat, Kansas and Oklahoma to Gulf Port, supra*, note 2; I.&S. 9052, *Wheat, New Mexico and Texas to Texas Ports*, 355 I.C.C. 237, (decided October 19, 1976);[5] *Corn & Soybeans Midwest to Gulf Ports*, 349 I.C.C. 1 (1974).[6] As stated, although the Commission has not previously inquired into what divisions were offered, there is concern that if an origin carrier is not required to show that it has made a good faith offer of divisions, it could always evade a finding of common control by predicating a lower joint rate upon a division of revenues which substantially reduces the share of the connecting carrier, or upon some other condition which could reasonably be expected to induce the nonconcurrence of the connecting carrier. If the connecting carrier would refuse to concur, the Commission would be left with no alternative but to find that the carrier did not have common control. Accordingly, in the order of September 7, 1977, in this proceeding the Commission announced that it would require the origin carrier to establish that it had made a good faith offer before it could claim that nonconcurrence of the connecting carrier deprived it of common control. If it appeared in light of evidence submitted that a reasaonable offer was made, then good faith would be shown.

Although protestants have argued that divisions are irrelevant to this proceeding, common control is a concept designed to insure that the carrier or carriers causing viola-

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[5]Appeal docketed *sub nom., Nueces County Navigation District No. 1* v. *Interstate Commerce Commission*, No. 76-4490, 5th Cir.

[6]Appeal docketed *sub nom., Nueces County Navigation District No. 1* v. *United States*, No. CA-3-74-1253-D, N.D. Tex.

tion of section 3(1) has the alternative to raise or lower the rates at issue, so as to restore parity. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 650 (1933). Thus, the carrier or carriers must effectively participate in both the prejudicial and preferential rates. But if two carriers refuse to act in concert to set a joint rate to a port in which they can only serve jointly, because of a genuine divisions dispute, they cannot reasonably be said to be in control of the joint rate. Our inquiry into divisions in this proceeding extends from a concern that such a dispute could be deliberately induced, as described above. If so, the carrier making the divisions offer should not be able to claim that it lacks common control. No. 36491, *Wheat, Oklahoma and Kansas to Texas Gulf Ports*, sheet 11, (decided October 20, 1977).

The evidence submitted in regard to the present and proposed divisions amply demonstrates that the change in revenues to be received by the connecting carriers under the reduced rates is not substantial. The changes observed in revenues are for the most part, in fractions of 1 cent; as a consequence, the change in operating ratios are only 1 or 2 percent.

We are concerned that the operating ratios are below variable costs or only marginally above variable costs. Frisco contends that our order is limited to whether the reductions in offers of divisions are substantial and not as to the absolute values of the offers. We must emphasize that we have elicited the offers of divisions with a view to determining whether the origin carrier made a good faith offer. Further, we are in agreement with the parties that the construction of a divisional scale is not solely a matter of costs and mathematics but reflects many considerations. The evidence herein indicates that the proffer of divisions, if accepted, would result in revenues which are

very close to variable costs, sometimes slightly above and sometimes slightly below variable costs. Because of the lack of precision of the cost evidence (the parties agree that the costs are somewhat overstated) the revenues could most accurately be described as marginally compensatory.

The evidence on this record shows that the respondent did not attempt to induce deliberately the nonconcurrence of its connecting carriers. It offered divisions of revenue premised upon the same basis as the existing divisions, which the connecting carriers had previously accepted. The tender, if accepted, would have produced no reduction in the connecting carriers' percentage share of the revenues from the through movement and, at most, only a small reduction in the absolute revenues received by the connecting carriers. We note that in some instances there would be no change in the revenues received by the MoPac.

This is not to say that a tender of the same divisions by an origin carrier will necessarily result in a finding that it has made a good faith tender of divisions. Changed circumstances may render a previously reasonable divisions tender not only unacceptable to the connecting carrier but also so clearly unacceptable that its tender can be viewed as reflecting something less than good faith on the part of the originating carrier. The marginal profitability of the existing divisions to the connecting carriers means that a tender of the existing divisions under any changed circumstances merits careful examination. However, the change here is not so great, nor are the resulting divisions so obviously noncompensatory that we can conclude that the respondent offered them in an attempt to induce nonconcurrence by the connecting carriers.

In view of the record herein, we believe that respondent

has sustained its burden of proof that the offers of divisions were made in good faith, and that respondent has no common control over the rates. Under the circumstances, we need not reach the issue of the similarity of transportation conditions characteristic of the movements in issue.

In view of the above, we conclude that the issue schedules do not violate section 3(1) of the act.

District and Producers have argued that the reduced rates violate section 1(4) of the act apparently under the theory that through routes and just and reasonable rates are no longer in effect. We do not agree. The evidence of record, including cost evidence relating to the through movements, amply demonstrates that the present and proposed rates are just and reasonable. Further, outside of the allegation that the proposed schedules violate section 1(4), there is no evidence which would indicate that the parties would be unable to move the issue traffic from the origins to Corpus Christi. For these reasons, we find that the rates have been shown to be just and reasonable and not in violation of section 1 of the act.

We find that the assailed rates are not unduly prejudicial to Corpus Christi and unduly preferential of Galveston, Houston, Texas City, Beaumont, and Port Arthur.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER MURPHY, dissenting:

Respondent Frisco's evidence fails to convince me that it did, in fact, enter into serious negotiations over divisions

with the Missouri Pacific and the Southern Pacific on export grain to Corpus Christi. Actually, the evidence conclusively shows that the Frisco seeks, as an afterthought, to justify its initial purported offer to the two carriers. The majority's approval of such a device raises serious questions of due process, among other defects.

My position with regard to the exclusion of Corpus Christi in reduced rates on export grain has been noted in a number of proceedings and needs no further elaboration.[7] Succinctly stated, such proposals are in violation of the Gulf port equalization orders. See also, Public Law 94-210, section 202(f).

Today's decision leaves shippers and other interests at Corpus Christi in an unenviable position. They are left with virtually no remedy to counter the prejudicial treatment of the Frisco although the act was specifically designed to preclude such prejudicial treatment. Obviously, in the face of the majority's decision today, protestants must look to other forums for relief.

I respectfully dissent.

COMMISSIONER STAFFORD, dissenting:

I have previously noted my opposition to any requirement that the publishing carrier make a showing of a good faith offer to establish a joint rate.

In this proceeding, the majority found that a good faith offer was made primarily because it was based on one same percentage division as currently exists. I am con-

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[7]See, for example, *Corn & Soybeans Midwest to Gulf Ports*, 349 I.C.C. 1, 6-8 and No. 36491, *Wheat, Oklahoma and Kansas to Texas Gulf Ports*, 357 I.C.C. 352 (1977).

cerned, however, that future cases may not be as clear cut. The result will be that the parties will have to introduce the same type and quantum of evidence as they would in any ordinary divisions proceeding.

Unless the Commission is willing to formulate extensive guidelines about good faith offers and reasonable divisions, we should not be getting involved here. Anyone who has followed the Commission through the years knows that divisions cases are the most difficult we have, and involve many imprecise, vague and obscure issues of law and accounting. Every time we tangle with divisions matters, we learn that this subject is best left to arm's length bargaining among the carriers.

COMMISSIONER GRESHAM, dissenting:

I believe that the subject schedules must either be canceled or extended to Corpus Christi. I cannot agree with the basis of the order, whether Frisco has failed to satisfy its burden of proof as to a good faith offer to divisions to its connecting carriers. Common control would exist to these gulf ports even if good faith were established. See *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 655-70 (1933) (Stone, J., dissenting).

See also *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co.*, 253 I.C.C. 745, 749 (1942); *Port of New York Authority* v. *Baltimore & O. R. Co.*, 248 I.C.C. 165, 182 (1941); *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, 172 (1936).

I have previously expressed my position in a number of proceedings, including *Corn & Soybeans Midwest to Gulf Ports*, 349 I.C.C. 1, 6-8 (1974); *Corn & Soybeans Midwest to Gulf Ports, For Export*, 339 I.C.C. 595, 626 (1971); *Wheat and Grain Sorghums, Midwest to Texas Ports*, 337

I.C.C. 777, 782 (1970); and *Soybeans, Midwest to Chicago & Gulf Ports, Export,* 335 I.C.C. 883, 893 (1970).

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

(Seal)

H.G. Homme, Jr.,
Acting Secretary.

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APPENDIX A

Statement showing MP divisions of rates south of Fort Worth, Tex., on export shipments of wheat, and comparison of MP share of present and proposed rates in cents

From	To	MP percent revenue[1]	Present[2]			Proposed[2]			Reduction to MP on proposed vs. present rates
			Rate	MP proportion (col. C x col. D)	MP minimum revenue[3]	Rate	MP proportion (col. C x col. H)	MP minimum revenue[3]	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Oklahoma	*Texas*								
Guthry	Houston	20.3	68.5	13.9	18.4	66.5	13.5	18.4	[4]NC
Do	Corpus Christi	32	68.5	21.9	23.3	66.5	21.3	23.3	NC
Helena	Houston	20.3	67.5	13.9	18.4	67.5	13.7	18.4	NC
Do	Corpus Christi	32	68.5	21.9	23.3	67.5	21.6	23.3	NC
Kansas									
Winfield	Houston	19.9	80.5	16.0	18.4	79.5	15.8	18.4	NC
Do	Corpus Christi	31.4	80.5	25.3	23.3	79.5	25.0	23.3	-0.3
Arkansas City	Houston	19.9	80.5	16.0	18.4	78.5	15.6	18.4	NC
Do	Corpus Christi	31.4	80.5	25.3	23.3	78.5	24.6	23.3	-0.7
Oklahoma									
Middleton	Houston	20.3	73.5	14.9	18.4	72.5	14.7	18.4	NC
Do	Corpus Christi	32	73.5	23.5	23.3	72.5	23.2	23.3	-0.2
Bender	Houston	20.3	73.5	14.9	18.4	72.5	14.7	18.4	NC
Do	Corpus Christi	32	73.5	23.5	23.3	72.5	23.2	23.3	-0.2

See footnotes at end of table.

Statement showing MP divisions of rates south of Fort Worth, Tex., on export shipments of wheat, and comparison of MP share of present and proposed rates in cents—Continued

From	To	MP percent revenue[1]	Present[1]			Proposed[1]			Reduction to MP on proposed vs. present rates
			Rate	MP proportion (col. C x col. D)	MP minimum revenue[2]	Rate	MP proportion (col. C x col. H)	MP minimum revenue[2]	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Oklahoma	*Texas*								
Peckham	Houston	20.3	73.5	14.9	18.4	71	14.4	18.4	NC
Do	Corpus Christi	32	73.5	23.5	23.3	71	22.7	23.3	-0.2
Graieville	Houston	20.3	73.5	14.9	18.4	71	14.4	18.4	NC
Do	Corpus Christi	32	73.5	23.5	23.3	71	22.7	23.3	-0.2
Blackwell	Houston	20.3	72	14.6	18.4	69.5	14.1	18.4	NC
Do	Corpus Christi	32	72	23.0	23.3	69.5	22.2	23.3	NC
Eddy	Houston	20.3	72	14.6	18.4	68.5	13.9	18.4	NC
Do	Corpus Christi	32	72	23.0	23.3	68.5	21.9	23.3	NC
Lamont	Houston	20.3	70	14.2	18.4	67.5	13.7	18.4	NC
Do	Corpus Christi	32	70	22.4	23.3	67.5	21.6	23.3	NC
Salt Fork	Houston	20.3	70	14.2	18.4	67.5	13.7	18.4	NC
Do	Corpus Christi	32	70	22.4	23.3	67.5	21.6	23.3	NC

[1]Rates stated in columns D through J are in cents per hundred pounds at Ex Parte No. 336 level.
[2]Provided for in SLSF D/B 163-Grain-2, MoPac D/D No. 14249.
[3]No change.

Statement showing SLSF division of rates on export shipment of wheat when routed in connection with MP from Fort Worth and comparison of SLSF share of present and proposed rates in cents

From	To	SLSF percent revenue[2]	Present[1]			Proposed[1]			[3]Reduction to SLSF proposed vs. present rates
			Rate	SLSF proportion (col. C x col. D)	SLSF actual revenue[2]	Rate	SLSF proportion (col. C x col. G)	SLSF actual revenue[2]	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Oklahoma	*Texas*								
Goltry	Houston	79.7	68.5	54.6	50.1	66.5	53.0	48.1	-2.0
Do	Corpus Christi	68	68.5	46.6	45.2	66.5	45.2	43.2	-2.0
Helena	Houston	79.7	68.5	54.6	50.1	67.5	53.8	49.1	-1.0
Do	Corpus Christi	68	68.5	46.6	45.2	67.5	45.9	44.2	-1.0
Kansas									
Winfield	Houston	80.1	80.5	64.5	62.1	79.5	63.7	61.1	-1.0
Do	Corpus Christi	68.6	80.5	55.2	55.2	79.5	54.5	54.5	-0.7
Arkansas City	Houston	80.1	80.5	55.2	62.1	78.5	62.9	60.1	-2.0
Do	Corpus Christi	68.6	80.5	55	55.2	78.5	53.9	53.9	-1.3
Oklahoma									
Middleton	Houston	79.7	73.5	58.6	55.1	72.5	57.8	58.1	-1.0
Do	Corpus Christi	68	73.5	50.0	50.0	72.5	49.3	49.2	-0.8
Bender	Houston	79.7	73.5	58.6	55.1	72.5	57.8	54.1	-1.0
Do	Corpus Christi	68	73.5	50.0	50.0	72.5	49.3	49.2	-0.8

See footnotes at end of table.

Statement showing SLSF division of rates on export shipment of wheat when routed in connection with MP from Fort Worth and comparison of SLSF share of present and proposed rates in cents—Continued

From	To	SLSF percent revenue[2]	Present[1]			Proposed[1]			Reduction to SLSF proposed vs. present rates
			Rate	SLSF proportion (col. C x col. D)	SLSF actual revenue[2]	Rate	SLSF proportion (col. C x col. G)	SLSF actual revenue[2]	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Oklahoma	*Texas*								
Peckham	Houston	79.7	73.5	58.6	55.1	71	56.6	52.6	-2.5
Do	Corpus Christi	68	73.5	50.0	50.0	71	48.3	47.7	-2.3
Grainville	Houston	79.7	73.5	58.6	55.1	71	56.6	52.6	-2.5
Do	Corpus Christi	68	73.5	50.0	50.0	71	48.3	47.7	-2.3
Blackwell	Houston	79.7	72	57.4	53.6	69.5	55.4	51.1	-2.5
Do	Corpus Christi	68	72	49.0	48.7	69.5	47.3	46.2	-2.5
Eddy	Houston	79.7	72	57.4	53.6	68.5	54.6	50.1	-3.5
Do	Corpus Christi	68	72	49.0	48.7	68.5	46.6	45.2	-3.5
Lamont	Houston	79.7	70	55.8	51.6	67.5	53.8	49.1	-2.5
Do	Corpus Christi	68	70	47.6	46.7	67.5	45.9	44.2	-2.5
Salt Fork	Houston	79.7	70	55.8	51.6	67.5	53.8	49.1	-2.5
Do	Corpus Christi	68	70	47.6	46.7	67.5	45.9	44.2	-2.5

[1]Rates stated in columns D through J in cents per hundred pounds at Ex Parte No. 336 level.
[2]Provided for in SLSF D/B 1683-Grain-2. MoPac D/B No. 14249, MoPac receives a minimum of 23.3 cents per cwt. south of Fort Worth.

APPENDIX B

Statement showing SP divisions of rates south of Fort Worth or Dallas, Tex., on export shipments of wheat, and comparison of SP share of present and proposed rate in cents

From	To	SP percent[2]	Present[1]		Proposed[1]		Reduction to SP on proposed vs. present rates
			Rate	SP proportion (col. C x col. D)	Rate	SP proportion (col. C x col. F)	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
Oklahoma	*Texas*						
Goltry	Corpus Christi	32	68.5	21.9	66.5	21.3	0.6
Helena	do	32	68.5	21.9	67.5	21.6	0.3
Kansas							
Winfield	do	31	80.5	25.0	79.5	24.6	0.4
Arkansas City	do	31	80.5	25.0	78.5	24.3	0.7
Oklahoma							
Middleton	do	32	73.5	23.5	72.5	23.2	0.3
Bender	do	32	73.5	23.5	72.5	23.2	0.3
Peckham	do	32	73.5	23.5	71	22.7	0.8
Grainville	do	32	73.5	23.5	71	22.7	0.8
Blackwell	do	32	72	23.0	69.5	22.2	0.8
Eddy	do	32	72	23.0	68.5	21.9	1.1
Lamont	do	32	70	22.4	67.5	21.6	0.8
Salt Fork	do	32	70	22.4	67.5	21.6	0.8

[1]Rates stated in columns D through H in cents per hundred pounds at Ex Parte No. 336 level.
[2]Provided for in SLSF D/B 1724-Grain-6, SP D/B 1999.

Statement showing SLSF divisions of rates on export shipments of wheat, when routed in connection SP from Fort Worth or Dallas, Tex., and comparison of SLSF share of present and proposed rates in cents

From	To	SLSF percent[2]	Present[1]		Proposed[1]		Reduction to SLSF proposed vs. present rates
			Rate	SLSF proportion	Rate	SLSF proportion	
(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
Oklahoma	***Texas***						
Goltry	Corpus Christi	68	68.5	46.6	66.5	45.2	1.4
Helena	do	68	68.5	46.6	67.5	45.9	0.7
Kansas							
Winfield	do	69	80.5	55.5	79.5	54.9	0.6
Arkansas City	do	69	80.5	55.5	78.5	54.2	1.3
Oklahoma							
Middleton	do	68	73.5	50.0	72.5	49.3	0.7
Bender	do	68	73.5	50.0	72.5	49.3	0.7
Peckham	do	68	73.5	50.0	71	48.3	1.7
Grainville	do	68	73.5	50.0	71	48.3	1.7
Blackwell	do	68	72	49.0	69.5	47.3	1.7
Eddy	do	68	72	49.0	68.5	46.6	2.4
Lamont	do	68	70	47.6	67.5	45.9	1.7
Salt Fork	do	68	70	47.6	67.5	45.9	1.7

[1]Rates stated in columns D through H are in cents per hundred pounds at Ex Parte No. 336 level.
[2]Provided for in SLSF D/B 1724-Grain-6, SP D/B 1999.

APPENDIX C

No. 36491 (SUB-NO. 1)

WHEAT, OKLAHOMA AND KANSAS TO TEXAS GULF PORTS

Decided February 2, 1979

Alternative order cannot be issued when origin carrier, which directly serves preferred ports but only indirectly serves a prejudiced port, is not in actual control of rates to the prejudiced port. Actual control determined by surrounding circumstances, including good faith offers of divisions. Prescribed rates found not to be appropriate, justified both on the bases of policy considerations and on the record. Proceeding discontinued.

Donald E. Engle, Hugh L. McCully, Donald E. Ransom, and Donal L. Turkal for respondents.

Frank C. Brooks, Andrew P. Goldstein, Raymond R. Nolen, and M.H. Swanson for protestants.

DECISION

SUMMARY

The central issues in this proceeding are: (1) whether the reduced carload rates on wheat which are afforded to various Texas gulf ports but not to Corpus Christi, TX, are unduly preferential to these various Texas gulf ports and prejudicial to Corpus Christi in violation of 49 U.S.C. 10741(b) (formerly section 3(1) of the Interstate Com-

merce Act (act)),[1] and (2) whether the reduced rates violate outstanding orders in *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 291 I.C.C. 459 (1954), and *Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co.*, 315 I.C.C. 155 (1961) (the *Corpus Christi* cases).

A distinction must be made between preference and prejudice and *undue* preference and prejudice. As a general rule, not all preferences to one locality and prejudice to another are considered undue and thus unlawful. In order to find undue and unlawful preference and prejudice, the following elements must exist. (1) There must be a rate disparity. (2) There must be actual or potential injury. (3) A similarity of transportation conditions must exist to both the preferred and prejudiced points. Finally, in order to provide a remedy with an alternative order, the carrier or carriers must control the rates to both the preferred and prejudiced points. *Texas & Pacific Ry. Co. v. U.S.*, 289 U.S. 627 (1933). An alternative order is one which allows the carrier or carriers to adjust the rates by raising the preferred rate, or lowering the prejudicial rate or altering both to remove the unlawfulness.

Our determination of the issues in this proceeding hinges on the fourth element; that is, whether there is common control of the rates to both the preferred and prejudiced ports. (The other three elements are also discussed in this decision.) Without this fourth element, an alternative order cannot be issued under section 10741.

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[1]The Interstate Commerce Act was revised and codified without substantive change on October 17, 1978, at 49 U.S.C. 10101 *et seq.* Under the revised code. 49 U.S.C. 10741 prohibits "unreasonable discrimination," a term replacing "undue preference and prejudice" of section 3(1) in the former act. In order to be consistent with the prior report, and because there is no substantive change in the new code. we will continue to use the terms "preference" and "prejudice."

Respondent, St. Louis-San Francisco Railway Co. (Frisco), which does not serve Corpus Christi directly, did not publish the reduced rates to that port because it could not obtain concurrences from the two connecting carriers which serve Corpus Christi. The two connecting carriers, Missouri Pacific Railroad Company (MoPac) and Southern Pacific Transportation Company (SP), were also made respondents in this proceeding. We found in the prior decision that the reduced rates violate neither section 3(1) of the act (49 U.S.C. 10741) nor our outstanding *Corpus Christi* orders. These findings were based upon our conclusion that Frisco does not possess common control over the rates to both the preferred and prejudiced ports.

Protestants Louis Dreyfus Corporation (Dreyfus) and Nueces County Navigation District No. 1 and Producers Grain Corporation (collectively District) present the following basic arguments. First, a finding of control is unnecessary to issue an alternative order under section 10741. Second, if common control is a necessary element to issue an alternative order, then Frisco commonly controls the rates both to the preferred ports and to the prejudiced port of Corpus Christi, thus allowing the issuance of an alternative order. Third, a finding of common control is an unnecessary element to prescribe rates. Fourth, the publication of the reduced rates to ports other than Corpus Christi is within the scope of the outstanding *Corpus Christi* order.

After careful consideration of these arguments, we conclude first, that common control of the rates to both the preferred and prejudiced ports remains a necessary element for issuing an alternative order. Second, in our opinion Frisco does not control the rates to Corpus Christi. Therefore, we cannot issue an alternative order. Third, not only does this record fail to afford a basis for rate

prescriptions, but also considerations of carrier rate flexibility would preclude our prescribing rates in any event. Finally, the *Corpus Christi* cases will be reopened to determine whether those decisions are consistent with the action taken in this case.

BACKGROUND

In the prior report served December 19, 1977, reduced carload commodity export rates on wheat from points in Oklahoma and Kansas to the Texas ports of Beaumont, Galveston, Houston, Port Arthur, and Texas City, but not Corpus Christi, were found not unduly preferential or prejudicial or otherwise unlawful. Petitions for administrative review were filed January 9, 1978, by protestants Dreyfus and by District.[2] On the same date, Cook Industries (Cook) filed a petition for leave to intervene and a petition for administrative review. Respondents replied.

We reopened this proceeding on the present record by our order of June 20, 1978, subject to court approval, to reconsider the highly important and unusual issues raised both in this case and in other cases discussed below. Cook's petition to intervene was granted in the same order. The facts are accurately stated in the prior report and are repeated here only to the extent necessary for an understanding of the issues.

Subsequent to our prior decision, Frisco received a concurrence from one of the connecting carriers, MoPac.

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[2]Because our prior full Commission decision was administratively final, District filed a court appeal in *Nueces County Navigation District No. 1 and Producers Grain Corporation v. Interstate Commerce Commission and United States of America*, 5th Cir. No. 78-1348.

Consequently, rates equivalent to those in effect on Frisco's lines to the other Texas gulf ports became effective February 22, 1978, to Corpus Christi.

By letter filed January 27, 1978, Frisco requested that this proceeding be discontinued. SP and protestant Dreyfus agreed that this proceeding should be discontinued. Dreyfus, however, also requested that the decision be vacated.

The filing of equal rates to Corpus Christi could be considered to moot the case by removing the alleged prejudice to that port. In the recent series of cases dealing with port equalization policy for the Texas gulf ports, similar concurrences have also been filed, technically mooting those cases. *E.g.*, I. and S. No. 8576, *Corn & Soybeans Midwest to Gulf Ports, for Export*, 349 I.C.C. 1 (1974), pending on review in *Nueces County Navigation District, et al. v. United States, et al.*, N.D. Tex., No. CA-3-74-1253D; I. and S. No. 9052, *Wheat, New Mexico and Texas to Texas Ports*, 355 I.C.C. 237 (1976), petition for review dismissed as moot in *Nueces County Navigation District No. 1, et al. v. ICC, et al.*, 5th Cir., No. 76-4490; I. and S. No. 9132, *Wheat, Kansas and Oklahoma to Texas Gulf Ports*; petition for review dismissed as moot in *Producers Grain Corp., et al. v. ICC, et al.*, 5th Cir., No. 77-1788; and this proceeding.[3] Although each of the above cases has been vacated (with the exception of this proceeding), we are readopting the reasoning of I. and S. No. 8576, I. and S. No. 9052, and I. and S. No. 9132 to the extent they do not conflict with the decision herein.

[3]We wish to emphasize that port equalization is currently under study by the Commission. This study by the Rail Service Planning Office had examined precedent cases, rate relationships, traffic flow, and carrier and port operating practices; a final report was issued January 1979. Following study of that report, the Commission will again examine the issue of port relationships.

These cases appear to fall within the scope of *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), in that the legal questions are "continuing" and "capable of repetition, yet evading review." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974). Because we do not wish to thwart judicial review on grounds of mootness, we expressly refused in our order of June 20, 1978, to grant Dreyfus' petition for vacation of our decision in this proceeding.

In the prior decision, we found rate disparities, injury, and similarity of transportation circumstances. Nevertheless, we concluded that the crucial element of common control was not present based on the application of the "good faith" test.[4] and that, without common control, the rates cannot be found to violate section 10741.

The carriers' argument that transportation conditions to Corpus Christi vary from those of the other ports was not adopted in the prior decision. The transportation conditions are not shown to have changed significantly from those that existed when the Corpus Christi equalization orders were entered in 1954 and 1961 and thus do not prevent a finding of a section 10741 violation herein. However, the establishment of the defense of different transportation conditions is not essential to respondents' case in view of the finding of lack of common control.

In discussing this proceeding, it is helpful to look at cases which have preceeded it, including the *Corpus Christi* cases on which protestants rely. In the *Corpus Christi* cases, the Commission concluded that the MoPac

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[4]The facts relevant to "good faith" test were discussed at length in our prior decision of December 19, 1977. Briefly, the divisions offered in connection with the reduced rates were not such as to compel nonacceptance.

and the Texas and New Orleans (now part of Southern Pacific), together with other carriers which served the Texas ports, acting in conjunction with the originating lines in the origin territory, directly and effectively controlled the rates to (as pertinent herein) the preferred ports (Galveston, Houston, and Port Arthur) and the prejudiced port (Corpus Christi). Under such circumstances the carriers act as a network in controlling the rates to both the preferred and prejudiced ports. Factors in determining a network are discussed later in this decision.

The *1961 Corpus Christi* decision upheld the 1954 decision in regard to common control and found it still to exist. In both the 1954 and the 1961 cases, which relied on the theory of network common control, the carriers were directed to remove the undue prejudice found to exist to Corpus Christi. These orders are still in effect.

More recent rate reductions accorded to various Texas ports but not Corpus Christi have resulted in decisions where, on the facts presented, we concluded that the carrier proposing the reduction did not have common control over the rates to the preferred and prejudiced ports.

The first of these cases was *Soybeans, Midwest to Chicago & Gulf Ports, Export,* 335 I.C.C. 883 (1970). As relevant to this case, the Commission there found the proposed reduced rates on soybeans just and reasonable and otherwise lawful and not in violation of the outstanding orders providing for equal treatment of Corpus Christi. The Chicago, Rock Island and Pacific Railway Company (Rock Island) and Kansas City Southern Railway Company had sought approval for reduced rates from the rate bureau membership but received a negative vote. The rates were then published individually by the two carriers. Because neither carrier reached Corpus Christi, each of-

fered to join in the reduced rates with the connecting carriers which served Corpus Christi (MoPac and SP). Because the destination carriers did not accept, there was not the joint participation in rate action which there had been in the *1954 Corpus Christi* cases. In the absence of such carrier interaction, we refused to find common control. While the matter was pending on judicial review, the carriers established equivalent joint rates to Corpus Christi, thereby mooting the case. Nevertheless, the court reviewed the Commission's decision, disagreed with it, and reversed the case. While that adverse judgment was pending on appeal in the Supreme Court, the Commission vacated its decision. The Supreme Court then remanded the case to the district court with directions to dismiss the case as moot.[5]

In a subsequent rate reduction, Rock Island proposed reduced multiple-car rates on corn and soybeans over its lines from the Midwest to Galveston, Houston, and Texas City but not to Corpus Christi; the connecting carriers again failed to concur. *Corn & Soybeans Midwest to Gulf Ports, for Export,* 339 I.C.C. 595, modified at 349 I.C.C. 1 (1974). At 349 I.C.C. 4, we stated that if one railroad serve one port directly and serves the other by joint service with a second railroad, section 3(1) (section 10741) does not give this Commission the power to require equalized rates in the event that the second railroad refuses to participate in equalized joint rates.[6]

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[5]*Chicago, R. I. & Pacific R.R. v. Nueces County Navigation District,* 415 U.S. 953 (1974).

[6]E.g., I. and S. No. 9052. *Wheat, New Mexico and Texas to Texas Ports, supra;* and I. and S. No. 9132. *Wheat, Kansas and Oklahoma to Texas Gulf Ports, supra.*

Subsequent cases have posed the issue of common control under similar circumstances.[7] We conclude that common control was present in those cases. We based our findings on more detailed knowledge of the circumstances relating to the offers and refusals of division arrangements.

Alternative Orders and Common Control

Unless common control exists, no alternative order can be issued under section 3(1) to remedy undue preference and prejudice. In *Texas & Pacific Ry. Co., supra,* the Supreme Court held that, to be subject to an order under section 3(1) (49 U.S.C. 10741), a carrier or group of carriers must be the common source of the discrimination, effectively participate in both the preferential and prejudicial rates, and be in such a situation that they have an actual alternative to raise one rate, lower the other, or alter both. The carriers do not have such an alternative unless they control the rates to both the preferred and prejudiced points. *Texas & Pacific, supra,* at 650.

Protestants argue that *Ayrshire Corp. v. United States,* 335 U.S. 573 (1949), explicitly modified, and partially overruled the court's prior decision in the *Texas & Pacific* case. In *Ayrshire,* the court concluded that while the rates violated section 3(1) (section 10741), common control was not a necessary element when a section 15(1) order (now 49 U.S.C. 10704) prescribing rates is issued. The court had previously stated in *Texas & Pacific* that minimum/maximum rate orders issued pursuant to section 15(1) (section

[7] I. and S. No. 9169, *Corn, Wheat or Grain Sorghums, to Texas Ports,* 359 I.C.C. 132 (1978); *Wheat, Oklahoma and Kansas to Texas Gulf Ports,* 357 I.C.C. 352 (1977).

10704) would not require the options of an alternative order. *Texas & Pacific, supra,* at page 650, footnote 39. The court again pointed this out in *Ayrshire* at pages 593-594:

> This is not a case like *Texas & Pacific R. Co. v. United States, supra,* where the Commission issues a so-called alternative order directing the carriers to remove an unjust discrimination or undue preference which has been found. That kind of order leaves a choice to the carriers whether to eliminate the unlawful practice by raising one rate, lowering the other, or altering both. But as we recently held in *New York v. United States, supra,* at 342, the rule is not applicable where the Commission itself undertakes to correct the unlawful practice by prescribing the just and reasonable rate. The Commission has taken that action here. As we noted above, the present proceeding was one under § 15(1) and § 15(7). Section 15(1) gives the Commission power to determine and prescribe the just and reasonable rate once it finds, *inter alia,* that any rate charged is unjustly discriminating or unduly preferential or prejudicial. The Commission in the present case has exercised that power. It has prescribed approved rates. They are rates which in the Commission's judgment will eliminate the unjust discrimination and undue preference found to exist in this rate structure. Hence the question whether Milwaukee effectively controlled the higher joint-line rates is irrelevant here. *New York v. United States, supra.*

District argues that *New York v. United States,* 331 U.S. 284 (1947), and a 1940 amendment to section 3(1) (section 10741) overturned the decision in *Texas & Pacific* and thus eliminated the need for a finding of common

control. We do not agree. The 1940 amendment extended the prohibition against discrimination to regions, districts, and territories, *New York, supra,* pp. 296-97. As the court stated in *New York,* at page 300, "In other words, Congress did not introduce a new standard of discrimination by its amendment to section 3(1); it merely made clear its purpose that regions, districts, and territories should be the beneficiaries of the law against discrimination." Although this statement was made in the context that the Commission must take into account the transportation conditions in deciding whether there is discrimination between territories, it appears equally applicable here, especially in view of the court's statements in *New York.* There the court distinguished *Texas & Pacific* on the ground that the principle there announced "is applicable only where the Commission is directing the carriers to remove the discrimination" but not "where, as here, the Commission in order to eliminate territorial discriminations proceeds under § 15(1) to fix new reasonable rates." 331 U.S. at 342. Accordingly, a finding of common control is still necessary to issue an alternative order.

Prescribed Rates and Common Control

Protestants argue that prescribed rates could be ordered without a finding of common control. This argument is based on the fact that the first three elements of a section 10741 violation have been established (rate disparties, injury, and transportation conditions). They argue that since the fourth element of common control is needed only to establish a basis for an alternative order, a finding of common control is unnecessary for an order prescribing rates. The *New York* case decided that this Commission has authority to prescribe rates without a finding of common control to remedy territorial discriminations. *New*

York, supra, pp. 340-343. It is unclear from that case as to whether the court would have reached the same conclusion if the issues had been limited to section 3(1) (section 10741). The court in *Ayrshire,* citing *New York,* stated, however, that the Commission can remove undue preference and prejudice by prescribing rates, even though the rates under consideration were within the zone of reasonableness.[8] *Ayrshire, supra,* p. 594.

We believe prescribed rates under section 15(1) are not warranted because of the nature of the traffic and the flexibility needed to adjust rates as competitive conditions require.[9] It is well recognized that trucks are not regulated when hauling agricultural products, and water carriers are not regulated when carrying commodities in bulk, the manner in which most grain is transported. These carriers have the flexibility to adjust rates as economic and transportation conditions require. By comparison, prescribed rates would leave the rail carriers with little or no flexibility. Prescribed rates could result in charges which become too high in times of rapidly changing transportation and economic conditions. High rates as a result of rate prescriptions could prevent or restrict the

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[8]As discussed in the prior report, the reduced rates are clearly within the zone of reasonableness. Protestants have argued both explicitly and implicitly that the issue is not that their rates are too high, but that identical rates are not afforded to both Corpus Christi and the other Texas ports.

[9]A rate is prescribed under a section 10704 order. This order remains in effect unless modified. To modify a prescribed rate a carrier must first petition for permission to change the rate level. This petition is subject to opposition, reopening of the administrative proceeding and possible court appeal. See *Atchison, T. & S.F. Ry. Co. v. United States,* 284 U.S. 248 (1932). If the permission to change the rate is granted, the carrier may then publish the change. However, this rate change still remains subject to possible investigation and suspension in a subsequent proceeding.

farmers' ability to market farm products and could unjustifiably cause increases in consumer prices. The carriers themselves would lose revenues if a higher level of rates prevented traffic from moving. On the other hand, prescribed rate might eventually result in noncompensatory revenues to the carriers because of rapid inflation.

Further, the record in this proceeding is not sufficiently comprehensive to permit a rate prescription. There is no evidence as to what effects prescribed rates would have on the grain rate structure. Past rate prescriptions have been in relationship to existing commodity rate structures. *E.g., Ayrshire Corp. v. United States, supra; Youngstown Co. v. United States,* 295 U.S. 476 (1935), and *Franklin Limestone Co., Inc., v. Alabama G.S.R. Co.,* 264 I.C.C. 753 (1946). Here protestants have the burden of establishing a record sufficient for rate prescriptions,[10] including evidence describing the regional grain rate structure, the effects of prescribed rates for one carrier on this structure, and sufficient economic justification as to why prescribed rates should take precedence over carrier flex-

[10]The prior decision incorrectly implies that the burden of proof is on the respondent carriers in regard to section 3(1) (section 10741). A carrier's burden of proof under a section 15(8) investigation relates to the justness and reasonableness of the proposal. 49 U.S.C. section 10707. A respondent carrier does not initially have the burden of proof in respect to section 3(1) issues, except in regard to transportation conditions. *Lake Cargo Coal, Ky., Va., and W. Va. to Ashtabula Harbor,* 326 I.C.C. 63, 69 (1965). 329 I.C.C. 549, 553 (1967). Protestants have the burden in justifying prescribed rates. We note that under the Administrative Procedure Act (5 U.S.C. 556), the proponent of an order has the burden of proof unless otherwise provided by statute. Cf. *Lake Cargo Coal, Ky., Va., to Ashtabula Harbor, supra.* This result is also dictated by logic. If the burden of proof were on a carrier to show that prescribed rates were not justified, this would place an untenable burden on a carrier's right to set its own rates in the first instance.

ibility. Protestants have not met this burden. We, therefore, will not prescribe rates under these circumstances.

ALTERNATIVE ORDER

We now turn from the issue of whether rates should be prescribed to the issue of whether an alternative order can be issued under section 10704. The factual question is whether Frisco exercises actual control over the rates in such a manner that an alternative order can be issued. In *Texas & Pacific* the court stated that a carrier must be the common source of the rates to both the preferred and prejudiced points before we may issue an alternative order. The court stated at 289 U.S. 649:

> Where, however, a carrier whose lines reach, or which controls the rate to, one of the destinations, is a party to a joint rate to the other but cannot make or control the latter rate, or though it were to withdraw as a party thereto, or to cancel the rate, the discrimination would still continue — it cannot be held responsible, nor can any order to remove the prejudice run against it. [Footnote omitted.]

At 289 U.S. 650-51, the court quoted with approval from *Central Railroad of New Jersey v. United States*, 257 U.S. 247:

> In the *Central Railroad* case it was said (p. 259): But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination *only if each carrier has participated in some way in that which caused the unjust discrimination;* as where a lower joint rate is given to one locality than to another similarly

> situated. (Citing cases.) If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers***. What Congress sought to prevent by that section [3], as originally enacted, was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carrier. [Emphasis added.]

If Frisco does not effectively participate "in some way in that which causes the unjust discrimination," then it cannot have common control. *Ibid.*

In the simplest case, one carrier serving both points would clearly have common control. Similarly, if two or more carriers serve both points between them and are acting in concert, they would also have common control. The difficult factual questions arise as to whether the carriers are acting in concert when the origin carrier must serve one of the ports by a connecting carrier (which cannot serve the issue origins) and the connecting carriers do not concur in the origin carrier's changed rates.

Prior orders equalizing rates to Corpus Christi and other Texas ports were entered on the basis of our powers under section 3(1) (section 10741). We have the authority under section 10741 to remedy unreasonable discrimination between ports by a single carrier or a group of carriers acting in concert. If, for example, the origin carrier serves both the Galveston and Corpus Christi ports, we may require the carrier (under appropriate circumstances) to publish equivalent rates to both ports. Further, if two railroads jointly serve these two ports, they cannot publish rates favoring one port. We do not have the authority under section 10741 to equalize rates between two ports if each port is served by only one of two carriers and the two carriers do not act in concert.

In *Albany Port District Comm. v. Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, 172 (1936), the Commission found that a massive differential rate adjustment covering ports in the north Atlantic region demonstrated that the railroads serving those ports had acted in concert.[11] While none of the carriers served all the ports directly, as a group they had control of the rates to all the ports at issue.

In *Beaumont, Tex., Port Comm. v. Abilene & S. Ry. Co.*, 253 I.C.C. 127, 132-33 (1942), we found a network of rail systems because of the railroad's many points of intersection and because each of the carriers participated in joint rates to each of the ports and inland points covered by the complaint. A situation similar to the *Beaumont* case was found in the *1961 Corpus Christi* case. 315 I.C.C. at 162. While the *1954 Corpus Christi* order dealt with a broader origin area, the Commission again found that a network controlled the rates to the preferred and prejudiced ports. 291 I.C.C. at 470.

In the Corpus Christi cases, the Commission presumed that because of the interrelated nature of the rail network, common control existed. We do not believe that this

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[11]Thus the amount of a port rate between Baltimore and a point in Michigan is primarily determined, not by considering the distance and the transportation conditions appertaining to the routes over which that rate applies, but by deducting a certain differential from the rate between New York and the Michigan point. This differential rate adjustment was formed by the voluntary joint action of all the carriers serving the ports. It depends for its very existence upon the continued participation of every such carrier. And so long as this adjustment remains in existence each of these carriers effectively participates not only in the rates over its own line, but in every rate in the entire structure. In other words, the carriers serving the ports, acting together, exercise effective control over the entire structure of port rates to and from the ports other than Albany [219 I.C.C. 172.]

analysis is adequate in addressing the complex fact pattern we have before us. Here the Frisco has published a reduced rate by independent action in which the MoPac and SP have not concurred. Given these facts, and absent any deliberate action on the part of the Frisco to induce this nonconcurrence, we cannot find that any rail carrier controls the rates to the ports in question, nor can we find that these carriers acting in concert commonly control the rates. There is no evidence that the pricing policies of these railroads with regard to these ports have been jointly developed. On the contrary, each railroad has acted within the scope of its legitimate management discretion to establish cost related rates for these services by independent action. The *Corpus Christi* cases will be reopened to determine whether those decisions are consistent with the action taken here.

Our decision to focus on actual control, rather than to presume that carrier interaction inevitably leads to common control, is reinforced by important policy considerations. Congress stressed in the 4R Act that railroads have a need for flexibility in ratemaking if they are to compete in today's competitive environment.[12] Requiring equalized rates to the ports absent actual common control stifles ratemaking initiatives. Independent and aggressively competitive ratemaking must be encouraged.

Our interest in assuring that rail carriers have actual common control has developed in two stages. In the first set of cases, we determined that when a necessary connecting carrier refused to participate in joint equalized rates, the origin and connecting carriers were not acting in concert and, therefore, did not have common control over

[12]See section 101(b)(3) of the 4R Act.

these rates.[13] In the second group of decisions, which includes this case, we expressed concern that an origin railroad could evade a finding of common control by predicating its proposed joint rates on an unreasonable offer of division of revenue, thus assuring that the connecting carriers would refuse to enter into the joint rate.[14] We, therefore, required the origin carrier to show that it has made good faith offers of divisions. The mechanics of the good faith test can best be explained by beginning with a discussion of respondents' and protestants' respective burdens on the issue of common control.

To demonstrate common control, the protestant has the initial burden of proving that the originating carrier could serve both the preferred and prejudiced ports either by itself or by means of connecting carriers, acting as a network or otherwise. Here, Frisco serves the preferred ports directly and can serve Corpus Christi indirectly by means of SP or MoPac. After the protestant has shown that respondent can serve all the points, the burden then shifts to respondent to go forward and rebut protestant's evidence of control by showing that respondent made a good faith effort to arrive at a division of revenue agreement with the connecting railroads, but was unsuccessful in doing so. When respondent makes such a showing, it demonstrates that it has no actual control of the rates to the ports which it does not serve directly. There is, then, no common con-

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[13] *Soybeans, Midwest to Chicago and Gulf Ports for Export, supra; Corn & Soybeans Midwest to Gulf Ports, for Export,* 349 I.C.C.I.(1974); I. and S. No. 9052 (embraces I. and S. No. 9052 (Sub-No. 1)) *Wheat, New Mexico and Texas to Gulf Ports, supra;* I. and S. No. 9132, *Wheat, Kansas and Oklahoma to Texas Gulf Ports, supra.*

[14] No. 36491, *Wheat, Oklahoma and Kansas to Texas Gulf Ports, supra,* I. and S. No. 9169, *Corn, Wheat or Grain Sorghums, to Texas Ports, supra.*

trol of the rates under consideration. The burden of producing evidence on this issue is placed on the respondent carrier since it alone has access to the division of revenue information.[15]

To summarize, because of the need to assure rate flexibility, we have required proof that the railroads actually control the rates to the preferred and prejudiced ports. In this regard, we believe that the presumption of control extending from the existence of a network such as was found to exist in the Corpus Christi cases is insufficient to assure that actual control exists. While seeking proof of actual control, we have allowed the railroad to show that it does not have such control because it could not, after acting in good faith, arrive at divisions agreements.

DIVISIONS

We turn now to the topic of division of revenue itself, and what is a good faith offer. Our concern is that if an origin carrier is not required to show that it has made a good faith offer of divisions, it could always evade the finding of common control by predicating a lower joint rate upon an offer for divisions of revenues which substantially reduces the share of the connecting carrier, or upon some other condition which could reasonably be expected to induce the nonconcurrence of the connecting carrier. If the connecting carrier refuses to concur after a good faith offer of divisions, the Commission is left with no alternative but to find that the origin carrier does not have common control over the rates to the prejudiced port.

From the facts of this case, there is no doubt that Frisco negotiated divisions in good faith in its attempt to obtain

[15]See *Rate Incentives for Capital Investment*, 353 I.C.C. 760, 766 (1977).

concurrences. It went through established rate bureau procedures, and, after a negative vote by the bureau membership, independently published the lower rates. Even before independent publication, Frisco still attempted to obtain concurrences, based on existing division arrangements from the MoPac and SP, so that the reduced rates would be effective to Corpus Christi.[16] The divisions proffered by Frisco were basically identical to those in effect prior to the rate reductions. The cost evidence indicates that the revenues to the connecting carriers, both with the prior and new rates, were compensatory or only slightly noncompensatory.

The important factor is not the compensatory nature of the divisions, but whether the tender of existing divisions could be considered a good faith offer. Because the tender, if accepted, would have resulted in, at the most, only a small reduction of the connecting carrier's revenues, we again conclude that the respondent did not attempt deliberately to induce the nonconcurrence of its connecting carriers, and that the offers were made in good faith.[17]

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[16]We note that Frisco ultimately did obtain concurrences from Fort Worth and Denver Railway Company and Missouri-Kansas-Texas Railroad Company to the preferred ports.

[17]This is not to say that a tender of the same divisions by an origin carrier will necessarily result in a finding that it has made a good faith tender of divisions. Changed circumstances may render a previously reasonable divisions tender not only unacceptable to the connecting carrier but also so clearly unacceptable that its tender can be viewed as reflecting something less than good faith on the part of the originating carrier. The marginal profitability of the existing divisions to the connecting carriers means that a tender of the existing divisions under any changed circumstances merits careful examination. However, the change here is not so great, nor are the resulting divisions so obviously noncompensatory that we can conclude that the respondent offered them in an attempt to induce nonconcurrence by the connecting carriers.

Thus Frisco's actions in attempting to obtain concurrences, both prior and subsequent to the rate bureau's rejection, demonstrate Frisco's failure to participate effectively in the rates to Corpus Christi. We believe that this inability to obtain concurrences to Corpus Christi after making good faith divisions offers amply demonstrates that Frisco cannot be held responsible for the acts of the destination carriers and that the lawfulness of the reductions should not depend on the actions of those carriers. *Texas & Pacific, supra,* pages 650-51, citing the *Central Railroad* case. We conclude, then, that Frisco does not have control over the rates to the prejudiced port of Corpus Christi. Because Frisco lacks the necessary control over the rates to both the preferred and prejudiced ports, no alternative order can be issued.

The parties contend that we should not inquire into divisions in a section 3(1) proceeding. Protestants believe that, to the extent that inquiring into good faith offers of divisions is an extension of *Corn & Soybeans,* this test is unwarranted in view of the *Corpus Christi* orders. The carriers want us to look only at rates and services without investigation and disclosure of divisions information. Our obligation, however, is to make a decision consistent with the legal principles of *Texas & Pacific* and with facts adequate to support our conclusions. Omission of the good faith test would leave the record barren of facts which are essential to our conclusions on the common control issue. We are not attempting to conclude what divisions are proper, but merely that they were offered in good faith. Our examination of (1) the similarity between existing proposed divisions, (2) Frisco's efforts to obtain concurrences to Corpus Christi, and (3) the relatively small changes in the revenue-to-variable costs ratios, lead us to

conclude that Frisco acted in good faith and thus does not control the rates to Corpus Christi.[18]

In spite of these conclusions, Dreyfus would have the present rates to the preferred ports canceled under section 15(8),[19] thus placing the former and higher rates in effect. Dreyfus apparently reasons that an order to cancel the rates, in contrast to an alternative order, would not require a finding of common control. We do not find it neccessary to resolve this point because, under the circumstances of this case, we will not require a higher level of rates where the lower level is sufficiently compensatory. In the prior decision the cost data showed the lower rates to the preferred ports at 139 to 160 percent of variable costs. In the absence of evidence to the contrary, these ratios sufficiently demonstrate the reduced rates to be compensatory. Dreyfus indirectly supports this view when it terms the sought reduced rates to Corpus Christi, to which the transportation costs are higher, as compensatory. Accordingly, we will not order the reduced rates canceled.

We are urged to conclude that if Frisco acted in "good faith" by its divisions offers, then the connecting carriers acted in "bad faith" by their refusal to join in the reduced rates. We do not agree. Negotiations such as these,

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[18]Protestants have filed a petition for further hearing. Protestants seek to show that Frisco's division offers were considered too low by the connecting carriers. This request is denied. This issue is not whether the carrier offered the largest divisions possible but whether the negotiations were conducted in good faith considering the existing conditions.

[19]We note that in section 202(f) of the Rail Revitalization and Regulatory Reform Act, which amends section 15(7) of the Interstate Commerce Act (now section 15(8)), expressly states that nothing in the 4R Act amends sections 2, 3, or 4 of the Interstate Commerce Act (now 49 U.S.C. 10741 and 10726).

although carried out in good faith, will not necessarily culminate in concurrences. In other words, the test is not whether an agreement is reached, but the substance of the negotiations. Here the connecting carriers acted in good faith and within managerial discretion in rejecting offers that, although they were on the same percentage basis as existing divisions, were slightly lower in monetary terms. Further, our reason for inquiring into the proffered divisions was solely for determining common control and whether a section 10741 order would lie. A finding that all parties to the divisions negotiations acted in good faith precludes the entry of an alternative 3(1) order, under section 10741. Even if we were to find that the connecting carriers had acted in bad faith, they cannot control, and thus cannot adjust, the rates for shipments originating and terminating on Frisco's line.[20] Thus there cannot be a section 10741 alternative order solely against the connecting carriers.

On reconsideration, we find that the assailed rates are not in violation of section 10741 or otherwise unlawful. This decision does not affect the quality of the human environment.

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[20]Dreyfus states that "this mistaken focus of the majority's new section 3(1) doctrine is the fact that an origin carrier supposedly cannot compel a connecting carrier to join in a proposed rate reduction" and cites *Carolina, C. & O. Ry. Co. v. Southern Ry. Co.*, 299 I.C.C. 335, affirmed *Southern Ry. Co. v. United States*, 153 F. Supp. 57. This case focused on the reasonableness of the through rates. Lower rates were prescribed because the routes were commercially closed. The record in the present proceeding does not show that the route has been commercially closed, and thus would not justify requiring connecting carriers to join in a proposed rate reduction.

COMMISSIONER STAFFORD, concurring:

While I agree with the ultimate result, I reaffirm my opposition to the good faith offer of divisions test.

Congressional policy, most recently enunciated in the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210), indicates a clear intention to give railroads the greatest leeway in pricing flexibility. This so-called "good faith" test injects the Commission even more deeply into matters involving carrier management and pricing policies. The issue was resolved rather easily in this proceeding; however, other cases will surely be more difficult and time-consuming. If the carriers cannot arrive at a mutually acceptable joint rate among themselves. I see no need for the Commission to impose itself into the negotiating process.

COMMISSIONER GRESHAM, dissenting:

My dissent to the December 19, 1977 decision in this proceeding expressed the view that (1) the respondent carriers commonly control the rates at issue and (2) the schedules under investigation should either be canceled or extended to Corpus Christi. Within 2 months of that decision, respondents Frisco and MoPac did establish equal rates.

I find the pattern of these Gulf port cases[21] to be disturbing: rates are protested as prejudicial to Corpus Christi; the Commission investigates and finds (over

[21] In addition to the present proceeding, see also Investigation and Suspension Docket Nos. 8454, 8576, 9052 (Sub-No. 1), and 9132. I. and S. No. 8454 is perhaps typical. Denied relief by the Commission, Nueces County filed its court brief in August 1972. Shortly thereafter, in September 1972, the carriers extended the rate reductions to Corpus Christi.

vigorous dissent) no violation of former section 3(1), now 49 U.S.C. 10741(b), because of a lack of common control by the respondents; protestants seek judicial review; *then,* once the carriers become convinced that protestants are serious, they back down and offer equivalent rates to Corpus Christi. In my opinion, these ultimate filings confirm the carriers' control of the traffic.

Two other aspects of today's decision are also troubling.

The majority has ignored section 202(f)(3) of the 4R Act which arguably qualifies the ratemaking flexibility given the rail industry insofar as port rate relationships are concerned. It has also failed to determine if its decision will have a significant adverse effect on the competitive position of the shippers and consignees served by the respondent carriers, in violation of 49 U.S.C. 10704(e)(2), former section 15a(5).

The majority has declined to act under 49 U.S.C. 10704(a)(1), former section 15(1), because of the nature of the traffic and the flexibility needed by the carriers to adjust rates promptly. Taken literally, this is a declaration that the Commission now disavows the use of former section 15(1) with respect to grain. Without expressing an opinion on whether that approach is right or wrong, I note that it is at apparent odds with the pending action in *Feed Grains to New England,* 356 I.C.C. 678, 694-95 (1977), appeal docketed *sub nom. New England Grain and Feed Council, et al. v. United States,* No. 77-1324, D.C. Circuit, filed April 1, 1977.

For these reasons and the additional reasons noted in my separate expression of December 19, 1977, I respectfully dissent from today's decision.

It is ordered:

This proceeding is discontinued.

By the Commission. Chairman O'Neal, vice Chairman Brown, Commissioners Stafford, Gresham, Clapp and Christian. Commissioner Stafford concurring. Commissioner Gresham dissenting.

H. G. Homme, Jr.,
Secretary.

(Seal)

359 I.C.C.

APPENDIX D

No. 31098[1]

NUECES COUNTY NAVIGATION DISTRICT No. 1 v. ABILENE & SOUTHERN RAILWAY COMPANY, ET AL.

Decided July 21, 1980

Upon reopening of No. 31098 and No. 33447, actual control and not network of common control found to be the proper standard in *Corpus Christi* cases to establish common source of unreasonable discrimination under 49 U.S.C. 10741. Good faith test can be used to show actual control. Prior orders based on network common control vacated. In No. 36491 (Sub-No. 1)[2] standard applied and prior decision affirmed, as modified.

DECISION

BY THE COMMISSION:

BACKGROUND

The Commission has enuciated a four-part test to determine the issue of unreasonable discrimination under section 10741(b).

[1]This decision embraces No. 33447, Nueces County Navigation District No. 1 v. The Atchison, Topeka & Santa Fe Railway Company, et al., and No. 36491 (Sub-No. 1), Wheat, Oklahoma and Kansas To Texas Gulf Ports.

[2]359 I.C.C. 592 (1979). A petition for review of this case is pending before the fifth circuit in Nos. 78-1348 and 79-1816, *Nueces County Navigation District No. 1, et al. v. ICC and United States*. We sought and were granted permission by the court to reopen this case and resolve the issues first in the prescription proceedings, Nos. 31098 and 33447. This decision does so. It then applies the analysis adopted in Nos. 31098 and 33447 to the *Wheat* case.

> To support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competively injured, actually or potentially, (3) that the defendant carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. The complaining party has the burden of proving the presence of the first three factors and the carriers have the burden of justifying the disparity, if possible, in connection with the fourth factor. *Chicago & Eastern Illinois Railroad v. United States,* 384 F. Supp. 298 (N.D. Ill, 1974), *aff'd mem* 421 U.S. 956 (1975).

See also *Increased Rates Frozen Fruits & Vegetables,* 351 I.C.C. 676, 682 (1976); *Prince Albert Pulp Co., Ltd. v. Canadian Natl. Rys.,* 349 I.C.C. 482, 491 (1974); *Investigation of Railroad Freight Rate Structure,* 345 I.C.C. 1364, 1417 (1976). Thus, a finding of common control (element three of the four-part test) has been found necessary for a violation of 49 U.S.C. 10741. See *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 650 (1933).

By notice served November 15, 1979 and published in the Federal Register on November 26, 1979, we reopened No. 31098, *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.,* 291 I.C.C. 459 (1954) and No. 33447, *Nueces County Nav. Dist. No. 1, v. Atchison, T. & S.F. Ry. Co.,* 315 I.C.C. 155 (1961) (the *Corpus Christi* cases) to determine if port equalization orders entered in these proceedings based on earlier findings or violations of section 10741(b) should be modified. We indicated that our reexamination of these cases would be limited to the issue of actual control of rates to the gulf port and how control of these rates influences the Commission's authority to order relief in cases arising under 49 U.S.C. 10741(b)

(formerly section 3(1) of the Interstate Commerce Act).[3] We stated that we would focus on situations where carriers cannot agree on rate policies and, as a result, concurrences to joint rate changes cannot be obtained. We noted that we favored an analysis of actual control over joint rates in place of a conclusive presumption of common control.

This limiting of the issues to only one of the criteria under section 10741(b) was not and is not intended to detract from the importance the Commission places on the other three criteria. The fourth factor, similarity or disparity in transportation conditions, continues to be our primary consideration. It is axiomatic that there can be no discrimination if economic and operational analysis proves that different rates are appropriate. This analysis includes review of matters such as the different distances involved, alternative routings available, differences in the cost of service, and, especially, any differences in competitive conditions.

The need to undertake this transportation conditions analysis depends, however, on the complaining party's ability to satisfy the remainder of the test. Accordingly, as we were concerned here with the standard to be used in determining common control (the third criteria), and a

[3]Under 49 U.S.C. 10741(b) of the revised act, a common carrier "may not subject a person, place, port, or type of traffic to unreasonable discrimination." Under former section 3(1) of the act, it was unlawful for any common carrier "to make, give, or cause any undue or unreasonable preference or advantage" or to subject a person, place, port, or type of traffic "to any undue or unreasonable preference or advantage" or to subject a person, place, port, or type of traffic "to any undue or unreasonable prejudice or disadvantage." Because there is no substantive change in the law under the recodified statute, and because many of the court and Commission decision arose under the former act, we shall use interchangeably section 3(1) and 10741 and the terms "unreasonable discrimination" and "undue preference and prejudice."

change in that test could, in and of itself, invalidate our earlier prescription orders in these proceedings, we saw no reason to raise as an issue in this proceeding the transportation conditions issue.

The Federal Register notice requested that parties comment on the appropriate legal analysis of the issue of rate control in cases arising under 49 U.S.C. 10741 and the circumstances, if any, under which unequalized rate proposals should be found to violate 10741 when there is no common control.

Fifteen parties filed comments. As might have been anticipated, the port interests generally contended that there is no need to depart from network common control, that the good faith test is not an appropriate measure of common control, and that common control is not required to find a violation of section 10741 except when an alternative order is sought. The rail interests, on the other hand, argued that the old *Corpus Christi* orders have been preempted by the 4R Act and currently applicable standards of railroad ratemaking, that any future violations of section 10741 must be proven on the basis of actual common control, and that, absent common control, there are no circumstances under which rate proposals should be found to violate section 10741. We have considered all the comments received. They are discussed in detail below.

In the *Corpus Christi* cases, the Commission concluded that the carriers serving the Texas ports, acting in conjunction with the originating lines, directly and effectively controlled the grain and grain product rates to the preferred ports (Galveston, Houston, and Port Arthur) and the prejudiced port (Corpus Christi). 291 I.C.C. at 470; 315 I.C.C. at 163. We further found that these rates "are and for the future will be, unduly prejudicial to Corpus Christi and unduly preferential" of Galveston, Houston, and

other Texas ports to the extent that the rates to Corpus Christi exceed those to Galveston and Houston. 291 I.C.C. at 470; 315 I.C.C. at 163. The orders implementing the Corpus Christi reports required each of the defendant carriers "according as they participate in the transportation" to maintain rates which will prevent the undue preference and prejudice found to exist. For the reasons set forth in this decision, we find that the network common control standard used in these reports to determine undue preference and prejudice was inadequate and should be replaced with an actual control standard. We shall vacate the outstanding orders in these proceedings. Future challenges under 49 U.S.C. 10741 to carrier rate adjustments to the ports involved in these proceedings shall be considered under the actual control standard.

Procedural Issues

The Nueces County Navigation District No. 1 and Producers Grain Corporation (District) and the Bunge Corporation and Louis Dreyfus Corporation (Bunge) filed a petition requesting service of pleadings on all parties participating in the reopened cases and filing of replies. They argue that, because this is an adjudicatory proceeding, this procedure is necessary. We disagree. Under the APA, a rate prescription is treated as a rule, 5 U.S.C. 551(4). See *Alaska Steamship Co. v. FMC,* 356 F.2d 59, 61 (9th Cir. 1966). This is a rulemaking and not an adjudication because the Commission ordered the dependent carriers to abstain in the future from maintaining export rates on grain from the involved origin points to Corpus Christi that exceed those to the other Texas ports. 49 U.S.C. 10741. See *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 650 (1933). We are considering a broad change in approach, not application of a prior theory of law to

one particular set of facts. As required for a rulemaking proceeding under the APA, notice was published in the Federal Register informing interested persons of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b). Further, we do not believe cross-service and replies are necessary to a proper decision.

District filed on February 25, 1980, a motion to strike all or part of a number of pleadings because they are not briefs on the legal issues but attempts at injecting factual materials into this proceeding. The New Orleans Traffic and Transportation Bureau filed a motion to strike on February 28, 1980. The motions are not timely and shall be denied. Under rule 21(a) of the Commission's General Rules of Practice, 49 CFR 1100.21(a), a reply or motion addressed to any pleading must be filed within 20 days after the pleading was filed. The challenged pleadings were filed between 46 and 54 days thereafter.

The Common Control Test

The issue of what constitutes common control has produced a great deal of litigation before the courts and the Commission. In *Central Railroad Co. of New Jersey v. United States,* 257 U.S. 247, 259 (1921), Justice Brandeis rejected a strict liability standard for carriers participating in joint rates:

> But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination * * *. If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts

> of its connecting carriers. If that rule should prevail, only uniformity in broad privileges and practices, or the cancellation of all joint rates, could afford the carriers the assurance that they were not in some way violating the provisions of section 3.

The Supreme Court in *Texas & Pacific* attempted to define what Justice Brandeis meant by "participated in some way." It held that because a carrier would not be responsible for the discrimination, and also because an alternative order could not be given, the carrier or carriers "must effectively participate in both rates." 289 U.S. 649-50.

In response to the court decisions, the Commission developed its "network common control" concept in which railroads were viewed as an interlocking network, jointly controlling the rates to and from the ports. The earliest mention of this concept in a port case was in *Albany Port District Comm. v. Ahnappe & W. Ry. Co.*, 219 I.C.C. 151 (1936). We later defined network control in this manner:

> All [of the carriers], acting together, exercise effective control over the entire structure of rates to and from the ports, and therefore each of them participates not only in the rates over its own line, but in every rate in the entire structure, thereby collectively and individually joining in the unduly preferential rates * * * and the unduly prejudicial rates * * *. [*Beaumont, Tex., Port Comm. v. Abilene & S. Ry. Co.*, 253 I.C.C. 127, 132-3 (1942).]

Generally, our policy has been that the larger the geographic area examined, the more likely it is that the railroads would be found to have common control of the rates throughout the entire region. When the Commission

examined widespread rate adjustments, it did not necessarily focus on the rate to each individual point and was more likely to find that the railroads before it controlled the adjustment as a whole.[4]

In port cases, the focus has usually been on rates to only a few points. In recent years, common control has increasingly become a pivotal issue. See *Corn & Soybeans Midwest to Gulf Ports, for Export,* 349 I.C.C. 1 (1974) (vacated by Commission order of June 29, 1978, pending review in *Nueces County Navigation District, et al v. United States,* (N.D. Texas, No. CA-3-74-1253); *Corn, Wheat or Grain Sorghums, to Texas Ports,* 359 I.C.C. 132 (1978). Although in recent cases we have distinguished port cases from proceedings in which large regional and interterritorial rate adjustments are examined, we have in the past given ports the benefit of the network common control theory. The *Corpus Christi* cases are such an example. In reviewing these decisions, we note that common control was largely presumed. There was no extended analysis of whether the defendant carriers effectively controlled the rates. 291 I.C.C. at 469-70; 315 I.C.C. 162. We now find such an analysis of common control to be inadequate.

As a matter of fundamental fairness and in keeping with court interpretations, we believe that actual control, and not network common control, is necessary in finding a section 10741 violation in the *Corpus Christi* cases. The courts have held that section 10741 violations are not a matter of strict liability. Two single-line carriers will not be held accountable, nor will a carrier be liable by merely

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[4]See *Increased Rates Frozen Fruits & Vegetables,* 351 I.C.C. 676 (1976); *Washington Potato & Onion Shippers Assn., Inc., v. U.P.R. Co.,* 300 I.C.C. 537 (1957). But see *Feed Grains to New England,* 356 I.C.C. 678, 691 (1977).

participating in joint rates. See *Central Railroad.* Thus, carriers "must effectively participate in both rates." *Texas & Pacific,* 289 U.S. at 650. Carrier responsibility is necessary for a section 10741 violation; a conclusive presumption of carrier control is a deficient standard.

District and Bunge argue that departing from the network common control standard to one of actual control would change former section 3 and impair the antidiscrimination provisions of the statute enacted by Congress to protect shippers, ports, and localities from pernicious and detrimental actions by carriers. We disagree. Unless the carriers that effectively participate in the joint rates are responsible for a "voluntary and wrongful act," they do not violate former section 3(1), *id.* at 651 and no relief for shippers is appropriate. The standard urged by District and Bunge is basically no standard at all but an irrebuttable presumption leading to total port equalization and minimal or no rate flexibility. We do not believe this is what Congress and the courts intended.

Bunge draws a distinction between rate proposals and an existing network of rates. It states we should not add common control as a prerequisite to exercising our power under section 10741 when faced with unequalized rate proposals. We are not adding common control as a prerequisite under 49 U.S.C. 10741; the courts and Commission have consistently held it is a requirement before a finding of unreasonable discrimination can be redressed. We are here determining a standard for a finding of common control. Further, as we discuss *infra, New York* and *Ayrshire* do not require that we prescribe a rate absent common control.

As we noted above, in recent years we have been using an actual control standard in port cases. In the first of these cases, we found that when a connecting carrier refused to

participate in joint equalized rates, the origin and connecting carriers were not acting in concert and thus did not "control" the rates to the differently treated ports.[5] In our most recent cases on actual control, we have developed the "good faith offer of divisions" test. This test is used when a dispute over divisions is asserted as the obstacle to changing a joint rate. The origin carrier is required to show a good faith offer of divisions to its connecting carriers because of our concern that that carrier could avoid a finding of actual control simply by making an unreasonable offer of divisions of revenue that would assure the refusal of the connecting carriers to agree to adjusting the joint rate.

We find that the good faith test can be used in the *Corpus Christi* cases to determine actual control. That test is described in some detail in the *Wheat* case, 359 I.C.C. at 603-7. Briefly, to demonstrate common control the shipper, port, or locality has the burden of proving that the originating carrier could serve both the preferred and prejudiced ports either by itself or with connecting carriers. After this has been shown, the burden shifts to the carrier

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[5]See *Corn & Soybeans, Midwest to Gulf Ports, for Export*, 349 I.C.C. 1, 4 (1974):

Basic to section 3(1) is the concept of common control. Under outstanding orders of this Commission, if one railroad serves both Houston and Corpus Christi, it may not establish rates to one port without publishing equivalent rates to the other. Further, if two railroads jointly serve both ports, they cannot publish rates favoring one port. However, if one railroad serves one port directly and serves the other by means of joint service with a second railroad, section 3(1) does not give this Commission the power to require equalized rates in the event that the second railroad refuses to participate in an equalized joint rates. The first railroad, by its willingness to offer equivalent service at equivalent rates effectively rebuts any presumption of undue preference or prejudice arising from its publication of a reduced rate to one port.

to go forward and rebut the shipper's evidence of control. It can do so by showing an unsuccessful good faith effort to arrive at a division of revenue with the connecting carriers. When the carrier makes this showing, it demonstrates it has no actual control to the ports it does not directly serve and thus there is no common control. *Id.* at 603-4. Factors we shall consider in determining good faith are: the similarity between existing and proposed divisions; the carrier's efforts in obtaining concurrences; and the relatively small changes in revenue-to-variable cost ratios. *Id.* at 605-6.

The good faith test is criticized because it recognizes divisions disputes between carriers as a lawful reason for withholding reasonable rates to the public. The Santa Fe argues that the level of divisions on joint rates has historically been a matter between carriers.

It is true that, in general, divisions disputes do not justify denying relief to an adversely affected party. But this does not mean that we can never consider them in performing our duties under the act; "a division of a through rate may not *ordinarily* be made the standard of reasonableness of rates or the measure of discrimination." (Emphasis supplied.) *Sulphur, Louisiana and Texas to Mich., N.Y., Ohio, and Pa.*, 287 I.C.C. 129, 151 (1952). Moreover, the courts have not rejected the consideration of divisions of revenues in undue preference and prejudice cases. In light of the requirement of carrier responsibility for a section 1\ 741 violation, the issue of a good faith offer of divisions is properly within the scope of our inquiry.

It is also submitted that the good faith test should apply to connecting as well as originating carriers. We find this argument to be without merit. Only if a connecting carrier participates in both the movements to the allegedly pre-

ferred and prejudiced points can it be said to have common control and thus be subject to an alternative order.

Finally, it is argued that as practical matter the good faith test would put almost all joint rates beyond the reach of section 10741 as the railroads will grasp the simplicity with which charges of unreasonable discrimination can be evaded. We reject this contention. Congress has given us a mandate under 49 U.S.C. 10741 to protect persons, places, ports, or traffic types from unreasonable discrimination. This duty was reiterated in the transportation policy section of the revised Interstate Commerce Act. 49 U.S.C. 10101. We shall carefully scrutinize the evidence the carriers must present to show good faith to ensure that carriers do not "evade" their duty to provide nondiscriminatory rates.

We find that in the *Corpus Christi* cases actual control, which can be established through the good faith test, is necessary to determine the common source of discrimination under 49 U.S.C. 10741(b). Since the network common control standard was used in these cases, we shall vacate our outstanding Corpus Christi orders.

Rate Prescriptions in the Absence of Common Control

Parties here have argued, based on *New York v. United States,* 331 U.S. 284 (1947) and *Ayrshire Corp. v. United States,* 335 U.S. 573 (1949), that, even if common control is absent, rates can be prescribed under 49 U.S.C. 10704 (formerly section 15(1)) to remedy unreasonable discrimination. The *Wheat* case indicated some support for this position, although cautioning that it is unclear whether *New York* would have reached the same conclu-

sion if the issues had been limited to section 15(1). 359 I.C.C. 593, 599.

We disagree with these interpretations of *New York* and *Ayrshire*. In both cases, the reasonableness of the rate was also involved.

In cases such as those before us now which are limited solely to issues of discrimination, the only requirement for a remedy is that the discrimination be removed. This may be done by lowering one rate to the level of the other, raising one rate to the level of the other, or equalizing the rates anywhere in between. In these cases, the Commission is not called upon to make a judgment as to the reasonableness of the ultimate rate level.

Of course, there may be instances where the level of the rate is also at issue. A complainant may seek a prescription of a reasonable rate along with the discrimination relief if it believes the rate it is complaining about is unreasonably high. Or, the Commission, on its own initiative, may reach a similar conclusion. Clearly, we have authority under section 10704 if the rate is unreasonable or otherwise unlawful to prescribe rates. *New York* is consistent with this analysis. There the court recognized that the fixing of reasonable class rates throughout the Nation was done under former section 1, despite the fact that issues of discrimination also were involved. *New York,* 331 U.S. at 342. *Ayrshire* also involved a Commission determination that not only must discrimination be cured, but maximum reasonable rate findings were required. *Ayrshire,* 335 U.S. at 582-583.

We recognize that there is language in both these cases (notably *New York* at 342-43) that could lead one to con-

clude that the Commission may find unreasonable discrimination and prescribe a remedy (other than an alternative order) in the absence of common control. The following excerpt, taken out of context, could produce this conclusion.

> If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to section 3(1) fell far short of its goal.

However, when read in context with the immediately preceding discussion of section 1 issues and the court's recognition of the role of that section in these cases, we believe it is clear that the cited language was not intended to require the Commission to prescribe a rate to remove discrimination under former section 3(1) absent a finding by the Commission that such a prescription is necessary to correct rates which are otherwise unlawful. To read the quoted language as providing a new test of discrimination omitting the common control requirement would lead to the anomalous result in which the harsher remedy of a rate prescription applies when one of the four section 10741 factors is missing while the more flexible remedy of an alternative order applies when all four factors are present.[6]

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[6]Moreover, especially in the *New York* case, the court was considering the Commission's power to adjust rates on a broad territorial basis which is not involved here.

In light of this, it cannot convincingly be argued that common control is merely a procedural element necessary to issue an alternative order. It is instead, substantive evidence of carrier responsibility for unreasonable discrimination. Section 10704 is a remedial section of the act which provides for the prescription of maximum or minimum rates once there has been a violation of one of the substantive parts of the act. Unreasonable discrimination is such a substantive provision; common control is merely one of the case law developed criteria for a finding of unreasonable discrimination. Therefore, a rate cannot be prescribed absent common control unless there is some other violation of the act.

Even if *New York* and *Ayrshire* could be read as authorizing the Commission to prescribe rates absent a finding of common control or a violation of some other section of the act, clearly they do not require the Commission to do so. All of the reasons which support our belief that the act should be interpreted as we have indicated support a determination that, if we have this authority, it should not be exercised. Accordingly, we conclude that, even if we have the authority, we will not prescribe a rate to remove unreasonable discrimination absent common control unless it is necessary to cure some other violation of the act.

What we have said here as to exercise of our authority under section 10704 is equally applicable to our exercise of authority under other remedial sections of the act. Without a finding of substantive violation of the act, we will not order a rate canceled.[7]

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[7]See *New York v. United States*, 562 F. 2d 887, 898 (2d Cir. 1977), *Increased Rates Frozen Fruits & Vegetables*, 351 I.C.C. 676, 682 (1976), and *Corn and Corn Products, Illinois to Official Territory*, *332 I.C.C. 485, 490 (1968).*

Port Relationships

Finally, it is argued that certain ratemaking amendments of the 4R Act do not modify the application of section 10741 or affect the authority of the Interstate Commerce Commission related to rate relationships between ports. We agree. Neither this decision nor the *Wheat* case are consistent with this section. The act provides no special standards for review of port relationships. Rates for the ports are judged on the same basis as other rates, with the same standards of lawfulness. Moreover, our findings are in keeping with section 101(b)(3) of the Railroad Revitalization and Regulatory Reform Act of 1976 which declares it to be the policy of the Congress to permit the railroads greater freedom to raise or lower rates in competitive situations. This statement of congressional policy supports the actual control standard. A policy of near strict liability does not comport with carrier freedom. To impose a strict liability standard of network common control without regard to the ability of the carrier to remedy the unlawful discrimination is totally at odds with congressional policy of giving railroad management greater rate flexibility. Similarly, our refusal to prescribe a rate in the absence of actual control also comports with the congressional policy encouraging pricing flexibility and competition.

The Wheat Case

By order of January 29, 1980, the United States Court of Appeals for the Fifth Circuit remanded the record in the *Wheat* case to the Commission. *Nueces County Navigation District No. 1, et al. v. United States,* Nos. 78-1348 and 79-1816. For the reasons indicated in this decision, we reaffirm our application in the *Wheat* case of the actual control standard.

In this case, the St. Louis-San Francisco Railway Co. (Frisco) published reduced rates to certain Texas ports it serves in joint-line service in connection with Fort Worth and Denver Railway Co. (FWD) and Missouri-Kansas-Texas Railroad Co. (MKT).[8] The carriers with which it connects to serve Corpus Christi refused to join in similar reductions to that port, despite Frisco's continued good faith offers of division. We find that the *Wheat* case properly held that the assailed rates were not in violation of section 10741 because there was no finding of actual control. We reaffirm the *Wheat* case finding that actual control is determined by surrounding circumstances, including good faith offers of divisions.

We also reaffirm the *Wheat* case finding that no prescription under section 10704 may be ordered both for the reasons stated in that decision and because, as we have indicated in this decision, there must be a finding of a violation of a substantive section of the act before a rate can be prescribed. The only allegations of unlawfulness in this proceeding concern section 10741. To the extent the *Wheat* case indicates that a prescription to correct unreasonable discrimination in the absence of common control may be ordered, it is modified in accordance with this decision.

It is ordered:

The orders in No. 31098, *Nueces County Navigation District No. 1 v. Abilene & Southern Railway Company,*

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[8]We also wish to clarify that, contrary to the statement at 359 I.C.C. 603, Frisco does not serve any of the allegedly preferred points directly. The Frisco's lines do not extend south of Dallas, and Fort Worth, TX, and Frisco obtained concurrences from FWD and MKT to serve the allegedly preferred ports. See 359 I.C.C. at 604, footnote 16, December 19, 1977 decisions at 8.

et al. and No. 33447, *Nueces County Navigation District No. 1 v. The Atchison, Topeka & Santa Fe Railway Company, et al.*, are vacated.

The actual control standard shall be used to determine the common source of unreasonable discrimination under 49 U.S.C. 10741(b) in future challenges to carrier rate adjustments to the ports in these proceedings.

Our decision in No. 36491 (Sub-No. 1), *Wheat, Oklahoma and Kansas To Texas Gulf Ports* as it applies the actual control analysis is affirmed. The discussion of rate prescriptions in the absence of common control is modified, as described in this decision.

This decision will not significantly affect either the quality of the human environment or conservation of energy resources.

This decision is issued pursuant to the authority of 49 U.S.C. 10321 and 10741 (the Interstate Commerce Act) and 5 U.S.C. 553 and 559 (the Administrative Procedure Act).

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam. Commissioner Stafford concurring in the result. Vice Chairman Gresham not participating.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

APPENDIX E

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 19th day of January, A. D. 1954.

No. 31098

NUECES COUNTY NAVIGATION DISTRICT NO. 1

v.

ABILENE & SOUTHERN RAILWAY COMPANY ET AL.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof, and the division having found in said report that the assailed rates on grain, grain products, and articles taking the same rates, in carloads, from points in eastern Colorado, Kansas, Missouri, Illinois, Iowa, Nebraska, South Dakota, North Dakota, Minnesota, and Wisconsin to Corpus Christi, Tex., for export, are, and for the future will be, unduly prejudicial to Corpus Christi and unduly preferential of Galveston, Houston, and other Texas ports to the extent that said rates exceed or may exceed the rates on like traffic to Galveston and Houston:

It is ordered, That the defendants named in the complaint, to the extent that they participate in the unduly preferential and prejudicial rates, be, and they are hereby

notified and required to cease and desist, on or before April 29, 1954, and thereafter to abstain, from practicing the undue prejudice referred to in the next preceding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before April 29, 1954, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 3.

GEORGE W. LAIRD,
Secretary.

(SEAL)

APPENDIX F

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 14th day of November, A. D. 1961.

No. 33447

NUECES COUNTY NAVIGATION DISTRICT NO. 1

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
ET AL.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaint, to the extent that they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 20, 1962, and thereafter to abstain, from practicing the undue prejudice and preference found in said report to exist.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, *on or before*

February 20, 1962, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and *apply rates, transit arrangements, regulations, and* practices which will prevent and avoid the undue prejudice and preference found in said report to exist.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 78-1348, 79-1816
80-1842 & 80-1843

ICC 36491

U.S. COURT OF APPEALS
FILED
JUN 1 1982
Gilbert F. Ganucheau
Clerk

NUECES COUNTY NAVIGATION DISTRICT NO. 1 et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

PRODUCERS GRAIN CORPORATION, et al., Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al, Respondents.

NUECES COUNTY NAVIGATION DISTRICT NO. 1, et al, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

PRODUCERS GRAIN CORPORATION, et al, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al., Respondents.

PETITIONS FOR REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

ON PETITION FOR REHEARING

(June 1, 1982)

Before CLARK, Chief Judge, RUBIN and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

APPENDIX H

SECTIONS OF THE INTERSTATE COMMERCE ACT PRIOR AND SUBSEQUENT TO RECODIFICATION

49 U.S.C. 3(1): It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

49 U.S.C. 10741(b): A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

49 U.S.C. 12(1)(a): The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons

controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

49 U.S.C. 10321(a): The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

49 U.S.C. 15(1): Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

49 U.S.C. 10704(a)(1): When the Interstate Commerce Commission, after a full hearing, decides that a rate

charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum of minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Commission.